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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

IN RE: RALPH MILLER,
Debtor,

RALPH MILLER,
Petitioner,
v.

FIRST FEDERAL OF MICHIGAN,
Respondent.

IN RE: EDWARD J. PIGLOSKI AND
MARY L. PIGLOSKI,
Debtors,

EDWARD J. PIGLOSKI AND
MARY L. PIGLOSKI,
Petitioners,
v.

MAXINE WYNN AND MANOR MORTGAGE CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Does the Bankruptcy Reform Act of 1978 permit a Debtor to cure a default on his residence after a foreclosure sale, as long as the default in question concerns property of the estate subject to the Bankruptcy Court's jurisdiction?

May a Debtor redeem his residence following a foreclosure sale by tolling the redemption period and paying the redemption amount through a Chapter 13 Plan?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Ralph Miller and Edward J. Pigloski and Mary L. Pigloski ("Petitioners") pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on April 16, 1985, and the opinions of the Court of Appeals for the Sixth Circuit denying the Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc entered on June 3, 1985. Those decisions squarely present important bankruptcy issues which this Court should decide.

OPINIONS BELOW

The opinion of the Court of Appeals (A-1a) is to be published, but has not yet been assigned a number in the Federal Reporter. Neither the opinion of the District Court in Miller (A-36a) nor the District Court opinion in Pigloski (A-47a) are reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 16, 1985. The order denying the Petitioners' timely Petitions for Rehearing and Suggestion for Rehearing En Banc was entered on June 3, 1985. This Petition was filed within 90 days of that date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 158, 1254(1) and 1334.

STATUTES INVOLVED

The statutes involved in the case are:

11 U.S.C. Section 108(b)

EXTENSION OF TIME

(b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 60 days after the order for relief.

11 U.S.C. Section 362(a)

AUTOMATIC STAY

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under Section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3), operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

11 U.S.C. Section 1322(b)(2), (3), (5), (10)

CONTENTS OF PLAN

(b) Subject to subsections (a) and (c) of this section, the plan may—

* * * *

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

(3) provide for the curing or waiving of default;

* * * *

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

* * * *

(10) include any other appropriate provision not inconsistent with this title.

STATEMENT OF FACTS

The petitioners are perfect examples of debtors who sought the protection of the Chapter 13 bankruptcy system to survive a difficult, recessionary economic period. Both Ralph Miller and Edward Pigloski are long time hourly employees of the Chrysler Corporation who have endured lengthy and repeated lay-offs. Since filing their Chapter 13 plans they have paid Twelve Thousand Three Hundred ($12,300.00) Dollars and Eighteen Thousand Two Hundred ($18,200.00) Dollars, respectively, to the trustee in attempts to successfully complete Chapter 13 reorganization plans. However, if *In re Glenn, et ux*, No. 82-3821, 83-1316, 83-1585 (6th Cir. April 16, 1985)

(A-1a), stands those payments will go for naught and the Petitioners will lose their homes.[1]

Ralph Miller

Mr. Miller purchased his home in Detroit, Michigan on August 5, 1980, for $26,500.00. It was subject to an existing mortgage held by respondent, First Federal of Michigan, with a balance of $20,900.00.

Following layoff from the Chrysler Corporation, Mr. Miller defaulted on the mortgage in 1981. First Federal commenced a non-judicial foreclosure by advertisement in March of 1982. On May 14, 1982, in the lobby of the City-County Building, a sheriff's sale was held. First Federal, the sole bidder, purchased the property, bidding the mortgage balance.

On November 2, 1982, before the statutory redemption period expired, Mr. Miller elected to use his Congressionally mandated right to reorganize his debt. In need of a breathing space to allow the conditions causing his indebtedness to pass, Mr. Miller filed a Chapter 13 petition and plan. In his plan, Mr. Miller proposed to cure his mortgage default by paying the arrearage and maintaining the current payments on the note at the rate of $96.00 per week.

Mr. Miller also moved the bankruptcy court to issue a stay order tolling the redemption period. The bankruptcy court denied the motion, denied confirmation of the plan, and lifted the automatic stay as to First Federal, allowing the mortgagee to pursue eviction.

Mr. Miller appealed these decisions to the district court. Judge Thornton reversed the bankruptcy court,

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[1] Parties to the proceeding in the court below were:

The Federal Land Bank of Louisville, Creditor-Appellant; Gerald David Glenn and Janice Sue Glenn, Debtors-Appellees; Edward J. Pigloski and Mary Pigloski, Plaintiffs-Appellants; Maxine Wynn and Manor Mortgage Company, Defendants-Appellees; First Federal of Michigan, Defendant-Appellant; Ralph Henry Miller, Plaintiff-Appellee.

holding that 11 U.S.C. Section 1322(b)(5) permits a Chapter 13 debtor to set aside a foreclosure sale, pay any arrearage, and reinstate the terms of the mortgage when the petition is filed before the redemption period expires.

The Sixth Circuit Court of Appeals reversed Judge Thornton and restricted the right to cure defaults on principal residences, under 11 U.S.C. Section 1322(b), to situations prior to a mortgage foreclosure sale. The Sixth Circuit adopted this position even though the Petitioner was in possession of the premises, and had filed a Chapter 13 prior to the expiration of the redemption period, and the purchaser at the sale was not a bona-fide third party.

Edward and Mary Pigloski

Edward and Mary Pigloski also sought the protection of the Chapter 13 provisions of the Bankruptcy Code (the "Code") while their home was in the redemption period after a foreclosure by advestisement pursuant to the Michigan statutory scheme. The foreclosure proceeding was instituted by respondent Maxine Wynn, who held a junior lien on the Pigloski property.

The home was encumbered by an existing first mortgage to Standard Federal Savings & Loan Association when the Pigloskis first began experiencing financial difficulties. As an initial solution to their problems, they entered into a loan agreement, arranged by Manor Mortgage Company, which required them to execute a mortgage and mortgage note in favor of respondent Maxine Wynn. The principal amount of the loan was $5,800.00. The petitioners only received $4,000.00, however, with $1,300.00 owing to Manor as a "brokerage fee" and the remainder covering certain costs. The transaction was characterized as a wrap-around mortgage with a blended interest note. To receive the loan the Petitioners were required to incorporate, since the interest rate charged exceeded 20%. Faced with a high combined mortgage payment and a job layoff, the Petitioners defaulted on their mortgage payment to Mrs. Wynn. She commenced fore-

closure by advertisement. Maxine Wynn purchased the property for the combined principal balances of both mortgages at a sheriff's sale held on November 20, 1981.

The Pigloskis filed their emergency Chapter 13 petition on April 30, 1982, and their Chapter 13 Plan on May 10, 1982, prior to the expiration of the redemption period.

In their Chapter 13 Plan, the Petitioners proposed to pay all amounts due and owing to Maxine Wynn within two and one half years. Shortly after filing their Chapter 13 petition, Petitioners moved the Bankruptcy Court for a Temporary Stay Order Tolling the Redemption Period and Restraining Order. They also argued that they could propose a plan to cure the arrearages on the mortgage through their Chapter 13 while maintaining current payments through the plan.

Bankruptcy Judge Graves held that the court had no authority to toll the statutory redemption period, and read into the record the court's opinion, which was eventually issued and reported as *In Re James*, 20 B.R. 145 (Bkrtcy. E.D. Mich. 1982). The Pigloskis appealed the decision to the District Court. In a Memorandum Opinion, Judge Boyle, then of the Federal Court for the Eastern District of Michigan, affirmed the Bankruptcy Court. (A-47a).

The Sixth Circuit Court of Appeals, in its opinion issued as *In Re Glenn, et ux* (A-1a), affirmed the Bankruptcy Court and the District Court.

In both cases, the parties stipulated to stay further proceedings while the appeals to the District Court and the Court of Appeals were pending. Under the stay now in effect, $133.00 per week is withheld from Mr. Pigloski's paycheck. From these monies, the Chapter 13 trustee makes the first mortgage payment each month and also distributes $101.13 to Maxine Wynn on the second mortgage. To date the Pigloskis have paid Eighteen Thousand Two Hundred ($18,200.00) Dollars to the trustee. By maintaining his payments of Ninety-Six

($96.00) Dollars per week to the trustee, Mr. Miller has paid over Twelve Thousand Three Hundred ($12,300.00) Dollars to the trustee.

REASONS FOR GRANTING THE WRIT

To date numerous courts have struggled with the proper interpretation of 11 U.S.C. Section 1322(b), trying to define a cohesive theory that determines the circumstances under which a Chapter 13 debtor may "cure" a mortgage default on his principal residence.[2] While

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[2] The circuits are uniform in holding that a debtor may cure a default once a mortgage debt has been accelerated. *In Re Taddeo*, 685 F.2d 24 (2nd Cir. 1982), *Grubbs* v. *Houston First American Savings Association*, 730 F.2d 236 (5th Cir. 1984) (en banc), *Matter of Clark*, 738 F.2d 869 (7th Cir. 1984), and *In Re Glenn*, *supra*.

The current disagreement is at what point after acceleration may the mortgage default be cured. The differing viewpoints are:

(1) Courts that hold that a debtor may cure a default where the mortgage debt has been accelerated provided that no foreclosure judgment has been entered: *Percy Wilson Mortgage & Finance Corp.* v. *McCurdy*, 21 B.R. 535 (Bkrcty.D.Conn. 1981); *In re Pearson*, 10 B.R. 189 (Bkrtcy. E.D.N.Y. 1981).

(2) Courts that hold that a debtor may cure a default where a state court judgment of foreclosure has been entered provided that no sale has taken place: *In re Acevedo*, 26 B.R. 994 (D.E.D.N.Y. 1982); *In re James*, 20 B.R. 145 (Bkrtcy.E.D. Mich. 1982); *In re Brantley*, 6 B.R. 178 (Bkrtcy.N.D.Fla. 1980); *In Re Glenn, supra*.

(3) Courts that place no express limitation on the debtors right to cure a default after acceleration: *In re Taddeo*, 685 F.2d 24 (2nd Cir. 1982); *Matter of Clark*, 738 F.2d 869 (7th Cir. 1984); *Grubbs* v. *Houston First American Savings Association*, 730 F.2d 236 (5th Cir. 1984) (*en banc*); *In re Sapp*, 11 B.R. 188 (Bkrtcy.S.D.Ohio E.D. 1981); *In re Davis*, 16 B.R. 473 (D.Kan. 1981). Or after a judgment has been entered: *In re Young*, 22 B.R. 620 (Bkrtcy.N.D.Ill. E.D. 1982); *In re Breuer*, 4 B.R. 499 (Bkrtcy.S.D.N.Y. 1980).

(4) Courts that hold that a debtor may cure a default where a foreclosure sale has been held provided that the debtor's right of redemption under state law has not expired: *In re Ivory*, 32 B.R. 788 (Bkrtcy.D.Or. 1983); *In re Johnson*, 29 B.R. 104 (Bkrtcy.S.D.Fla. 1983); *In re Chambers*, 27 B.R. 687

these courts have come to a variety of results based on similar facts, the case that provides the conceptual framework is *In Re Taddeo*, 685 F.2d 24 (2d Cir. 1982). *Taddeo* focuses on the right to cure defaults and the return of the debtor to the *status quo* prior to the default. The right to cure exists as long as the debtor retains an interest in the property at the time of filing the Chapter 13.

On a theoretical level, the Sixth Circuit in *Glenn* has broken with the conceptual framework of *Taddeo*. The *Glenn* opinion focuses not on the triggering event (the default), but on the status of the foreclosure proceedings at the time of filing the Chapter 13. In an admitted compromise, the Sixth Circuit draws a bright line at the sale. A debtor can cure before a sale; after a sale a debtor may not cure or even redeem.

The *Glenn* opinion is an opinion crafted on the basis of administrative convenience and compromise. If the frame of reference for interpreting the Bankruptcy Reform Act is "line drawing", then one could consider *Glenn* a good decision. If, the frame of reference is the rehabilitative purposes of Chapter 13 and federal bankruptcy policy, then *Glenn* inflicts significant damage to Congress' intent to rehabilitate debtors through payment plans. The *Glenn* opinion judicially denies access to the Chapter 13 procedure to a class of debtors most in need of Chapter 13 protection.

On a practical level, the holding of the Sixth Circuit also directly conflicts with results stemming from the Second Circuit opinion. If *Glenn* is not reversed, similarly situated debtors in the Sixth Circuit will be treated differently than those in the Second Circuit. In the Sixth Circuit, a debtor will lose his family home after the foreclosure sale. In the Second Circuit, as long as the debtor retains an interest in the property, the debtor will be able to pay the mortgagee its due within the Chapter 13

(Bkrtcy.S.D.Fla. 1983); *In re Taylor*, 21 B.R. 179 (Bkrtcy. W.D.Mo. 1982); *In re Thompson*, 17 B.R. 748 (Bkrtcy.W.D. Mich. 1982), or whose theory supports such a holding. *In re Taddeo*, 685 F.2d 24 (2nd Cir. 1982).

Plan, subject to the strict procedural safeguards that protect the mortgagee's security interest in the home.

In order to avoid continued confusion in the circuits, it is essential that this Court interpret federal bankruptcy law. This Court should reaffirm the right of debtors to cure defaults on residential mortgages as long as the debtor retains an interest in the property under state law, and guarantees creditors adequate protection of their security interest.

I. The Sixth Circuit in *Glenn* Expressly Limits a Debtor's Right to Cure Defaults Contrary to Federal Bankruptcy Policy and the Second Circuit's Decision in *Taddeo*.

The Sixth Circuit in *Glenn* is the first circuit to place an express limit on the debtors' right to cure a default after acceleration. Furthermore the holding of the Sixth Circuit directly conflicts with the theory of the Second Circuit as expressed in *In re Taddeo*, *supra*, at 24.

The *Glenn* opinion requires that bankruptcy courts look to see whether a sale has been held under state mortgage foreclosure law. Once that sale has occurred, the debtor's right to cure a default of the mortgage is terminated. In creating this "bright line", the Sixth Circuit focuses not on federal bankruptcy law concepts to determine how the line should be drawn, but instead on an identifiable event in the foreclosure process. By chosing an "event", the Sixth Circuit defers to the vagaries of state law to shape federal bankruptcy law policy. Thus the Sixth Circuit makes the Congressionally mandated policy of allowing debtors to cure mortgage defaults turn on whether or not a foreclosure sale has occurred under state law. That in turn results in similarly situated debtors receiving different treatment despite the guarantees of uniform bankruptcy law.

A. *Federal Bankruptcy Law Requires Uniform Treatment of Debtors in Chapter 13 Proceedings Who Are Subject to State Law Mortgage Foreclosures.*

The Federal Constitution, Article I, Section 8, gave Congress the power to establish uniform laws on the sub-

ject of bankruptcy throughout the United States. The Supreme Court has long recognized that Congress need not exercise that power. *Butner* v. *United States*, 440 U.S. 48, 54, (1979). However, once that authority is exercised state laws that conflict with the federal bankruptcy system are suspended. *Stellwagen* v. *Clum*, 245 U.S. 605, 613.

Thus, while Congress might choose to recognize state law that leads to different results in different states, Congress could equally choose to impose a uniform federal treatment, especially where there is an identifiable federal interest. *Butner* v. *United States*, *supra* at 55.

Petitioners suggest that Congress has identified a specific federal interest in protecting debtors' homes by allowing the curing of a default in Chapter 13. Petitioners further suggest that the concept of "curing a default" is one of federal bankruptcy law that requires uniform interpretation throughout the United States.

B. *The Bankruptcy Reform Act of 1978 Grants Debtors the Power to Cure Mortgage Defaults, Even After Foreclosure, as Long as the Default in Question Concerns Property of the Estate Subject to Bankruptcy Court Jurisdiction.*

The filing of a bankruptcy petition creates an estate comprised of "all legal or equitable interest of the debtor in property as of the commencement of the case," regardless of who holds the property or where it is located. 11 U.S.C. Section 541.

Upon confirmation of a plan of reorganization, the debtor remains in possession of his property, subject to the payment of claims that may or may not be secured by the property. 11 U.S.C. Section 1306(b); 11 U.S.C. Section 1322(b).

11 U.S.C. Section 1322(b) states how those claims may be treated in the Chapter 13 plan.

* * * *

(b) Subject to subsections (a) and (c) of this section, the (Chapter 13) plan may—

* * * *

> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, . . .
>
> * * * *
>
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

Subsection (5) allows a debtor to cure a mortgage arrearage during the life of the plan while maintaining current payments. The only limitations imposed on this right are (1) the default must be cured within a reasonable time, (2) the amount of the mortgage payment may not be reduced by the Chapter 13 Plan, and (3) the term of the mortgage must extend beyond the length of the plan.

C. *The "Bright Line" Created by the Sixth Circuit Ignores the 11 U.S.C. Section 1322(B)(5) Power to Cure Defaults Emphasized in* Taddeo.

In Re Taddeo, supra, eschews the "bright line" approach of *Glenn*. Instead of focusing on a point in time in the state law foreclosure process, the Second Circuit looks to the Bankruptcy Code's power to cure defaults. The court in *Taddeo* maintains simply that debtors have the power to cure defaults on residential mortgages as long as the property is subject to bankruptcy court jurisdiction. The proper focus is not on the consequences of the default. That result can be as varied in time and effect as the differences in acceleration, foreclosure by advertisement, judicial foreclosure, a sheriff's sale, final judgments and sales, an equity of redemption or statutory redemption.

Instead the key point is the default and the federal bankruptcy power to cure defaults under 11 U.S.C. Section 1322(b). The court in *Taddeo* explains that:

> . . . a default is an event in the debtor-creditor relationship which triggers certain consequences—here, acceleration. Curing a default commonly means taking care of the triggering event and returning to pre-default conditions.

In re Taddeo, 685 F.2d at 26-27.

The Second Circuit then held that "(w)hen Congress empowered Chapter 13 debtors to "cure defaults," we think Congress intended to allow mortgagors to "de-accelerate" their mortgage and reinstate its original payment schedule." *In re Taddeo*, 685 F.2d at 24, 26.

The theory of the "power to cure" is that since creditors receive all payments due, curing a default does not materially affect their rights. In discussing the voting rights of creditors under Chapter 11, Congress gave specific insight as to the power to cure:

> This section is new. It is designed to indicate when contractual rights of creditors or interest holders are not materially affected.
>
> * * * *
>
> Second, the Plan is permitted to reinstate a claim or interest and thus leave it unimpaired. Reinstatement consists of curing any default (other than a default under an *ipso facto* or bankruptcy clause) and reinstatement of the claim or interest.

House Judiciary Report, H.R. Rep. No. 95-595, 95th Cong., 1st Sess., p. 403 (1977).

The Senate Report was even more explicit:

> This section is designed to indicate when contractual rights of creditors or interest holders are not materially affected.
>
> * * * *
>
> Second, a claim or interest is unimpaired by curing the effect of a default and reinstating the original terms of an obligation when maturity was brought on or accelerated by the default. The intervention of bankruptcy and the defaults represent a temporary crisis which the plan of reorganization is intended to clear away. The holder of a claim or in-

> terest who under the plan is restored to his original position, when others receive less or get nothing at all, is fortunate indeed and has no cause to complain. Curing of the default and the assumption of the debt in accordance with its terms is an important reorganization technique for dealing with a particular class of claims, especially secured claims.

S. Rep. No. 989, 95th Cong., 2d Sess. 120 (1978).

Mortgagees typicially counter with the argument that the curing of a default must be a "modification" under the language of 11 U.S.C. Section 1322(b)(2). However, according to 11 U.S.C. Section 1123 a plan may *either* modify any lien (E) or cure any default (G). Curing a default is a more limited concept, under which the creditor is restored to his original position. Modification denotes more severe changes in the relationship such as forcing creditors to take less than that to which they are entitled.

Similarly, as Judge Lumbard explains in *Taddeo*, Section 1322(b)(5) explicitly states that the right to cure exists "*notwithstanding* paragraph (2)" and its limits on residential mortgage modification. *In re Taddeo*, 685 F.2d at 27. Modification of a claim within the bankruptcy context refers to reducing the sum of the payments made on a claim. *Id.* at 27. Curing the default consists of making all the payments originally agreed upon. *See Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 94th Cong., 1st Sess. 1027 (Statement of Walter W. Vaughn on behalf of the American Bankers Association); *Hearings before the Subcommittee on Improvements in the Judicial Machinery of the Senate Committee on the Judiciary*, 94th Cong., 1st Sess. 130.

The modification argument fails for another reason. The Code already "modifies" mortgagees' rights. The mere presence of 11 U.S.C. Section 362, which stays all debt enforcement activity, indicates an ability to modify the rights of mortgagees, e.g., their ability to accelerate or file a foreclosure action is stayed. Nor can they resort

to any other state remedies once the petition has been filed. The language contained in Section 1322(b)(2) must therefore be read in light of Section 362: not all modifications are prohibited, since Section 1322 does not preclude the application of Section 362.

D. *Under* Glenn *Sixth Circuit Debtors are Treated Differently Than Debtors in the Second Circuit.*

The Second Circuit has indicated expressly that the power to cure defaults extends to the post-foreclosure sale situation. The opinion in *Taddeo* cites with favor *In Re Thompson*, 17 B.R. 748, 753 (Bkrtcy W.D. Mich 1982) on two occasions. *In Re Taddeo*, 685 F.2d at 29. *Thompson* holds that the power to cure defaults is available to debtors retaining a redemption interest in the property, even though a sale has occurred.

To hold otherwise would be to adopt the mortgagees' position that Chapter 13 debtors may cure defaults only as provided by state law. However, that result ignores 11 U.S.C. Section 1322(b)(5) and is completely inconsistent with the "overriding rehabilitative purpose of Chapter 13". *In Re Davis*, 15 B.R. 22, 24 (Bkrtcy. Kan), aff'd, 16 B.R. 473 (D. Kan. 1981). *In Re Taddeo*, 685 F.2d at 29.

Thus, presented with the same facts as in the instant case, the Second Circuit would allow Mr. Miller and Mr. and Mrs. Pigloski to cure their defaults.

The problems with *Glenn* do not stop there. By deferring to state law concepts, the court allows debtors who are in essentially equivalent positions to obtain different results based on applicable state law. For example, in New York, foreclosure is a judicial procedure. A debtor may redeem the property at any time after final judgment but prior to the sale. New York Real Property Law, Sections 1341, 1351 (McKinney, 1979). During this time period but prior to the sale, the debtor has a common law equity of redemption.

In addition to that "redemption period", New York provides an additional period of time to redeem while the case goes through the judicial foreclosure proceedings. In *Taddeo*, the mortgagee commenced judicial foreclosure on October 9, 1979. By July 10, 1980 the sale had still not occurred. In essence, that New York debtor enjoyed a nine month redemption procedure prior to the sale.

Michigan mortgagees, on the other hand, foreclose primarily by advertisement. Mich. Comp. Laws Sections 600.3201 *et seq.* (Supp. 1985). The notice of sale need only be published for four (4) successive weeks. Mich. Comp. Laws Section 600.3208 (Supp. 1985). Thereafter, the mortgagor has either six months or one year, depending on the mortgage balance, to redeem the property. Mich. Comp. Laws Section 600.3240 (Supp. 1985).

If, however, *Glenn* is applied to both situations, the New York debtor has nine months after acceleration in which to seek protection under federal bankruptcy law, compared to approximately six to eight weeks for a Michigan debtor. Yet, *after* the foreclosure sale, the Michigan debtor enjoys rights under state law similar to those enjoyed by the New York debtor *prior* to the foreclosure sale. The Michigan debtor remains in possession of the property, maintains legal title and the right to sell the property, and enjoys the rents and profits from the property. Mich. Comp. Laws Section 600.3232; *Bankers' Trust Company of Detroit* v. *Rose*, 322 Mich. 256, 260, 22 N.W.2d 783 (1948).

If the "bright line" is applied to Ohio law, the disparity is even greater. After default in Ohio, the mortgagee has legal title, not the mortgagor. 47 Ohio Jur. 2d 129. The Ohio debtor can also be ejected, and if ejected, he loses his rights to rents and profits. However, since the foreclosure sale has not occurred, the Ohio debtor may cure the default, while the Michigan debtor may not.

In short, while the "bright line" approach may be convenient, it has the objectionable effect of preferring state property law distinctions to the detriment of the federal bankruptcy policy to rehabilitate debtors.

II. Legislative History and Intent Support the Conclusion That the Bankruptcy Reform Act of 1978 Compels the Allowance of Cure on the Debtor's Residence Under a Chapter 13 Plan.

A. *The Legislative History Confirms That Congress Intended a Meaningful Right to Cure Under Chapter 13 in Order to Protect Debtors' Homes.*

The legislative history of the Bankruptcy Code manifestly supports the proposition that Congress intended the cure provision contained in 11 U.S.C. Section 1322 (b) (5) to include the ability to cure defaults on home mortgages.[3]

> (T)he Commission recommends that the new Act authorize inclusion in any plan proposed under chapter VI, the successor to Chapter XIII of the present Act, provisions for the curing of defaults within a reasonable time and the maintenance of payments while the case is pending on claims secured by a lien on the debtor's residence and on claims secured by personal property on which the last payment is due after completion by the debtor of all payments under

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[3] This quotation also clarifies the language in 1322(b)(5) which suggests that the right to cure is limited to a "secured claim on which the last payment is due after the date on which the final payment under the plan is due". That original language was designed to make it clear that long term debts secured by personal property were distinguished from short term debts secured by personal property. Debts secured by a lien on the debtor's residence were always intended to be subject to a right to cure a default. Thus the quotation continues:

> With respect to short-term debts secured by personal property, the Commission recommends that the plan be permitted to include provisions dealing with such claims severally rather than generally as a member of a class of creditors. The proposal does not contemplate that the creditor so secured should be entitled to insist that the plan strictly preserve all of the terms of his original contract if the value of his claim against the property of the debtor is preserved. Insofar as there is a deficiency of the collateral to cover the claim of the secured creditor, he may be and should be treated as a member of the class of unsecured creditors. Report, Part I at 166.

Those provisions eventually became 11 U.S.C. Section 506.

> the plan. Report on the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 83-137, 93-137, 93d Cong., 1st Sess. Pts. I and II (1973), *reprinted in* Collier on Bankruptcy, App. 2 at 166 (15th Ed. 1981).

The above language was in response to frustration with the old Bankruptcy Act (the "Act").[4] Prior to adoption of the Code, the use of Chapter 13 was highly regional and sporadic. In enacting the Code, Congress sought to uniformly increase the relief available to individual debtors, in many cases eliminating the need of debtors to turn to the liquidation procedures available under Chapter 7.

> If a secured creditor is protected to the extent of the value of his collateral, there is no reason why he should be able to prevent the confirmation and consummation of a plan proposed by a debtor for the payment of his debts out of future income. Moreover, since Chapter XIII of the present Act is not carried in any form into the new Act, there is no reason for continuing the exclusion of a debt secured by real property used as a residence from the relief available to a debtor who proposes to pay his debts out of future income.
>
> Report of the Commission on Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, 93d Cong., 1st Session Pts. I and II (1973) *reprinted in* Collier on Bankruptcy, App. 2 at 166 (15th Ed.)

One of the co-sponsors of the bill that became the current Code further clarifies Congressional intent:

> These changes (in Chapter 13) will give personal debtors the protections they need to repay their debts, free from pressure of creditors who may not be willing to give the debtor a chance to try to work things out. We found that most individual debtors

---

[4] As a result of that frustration, courts restrained foreclosure on personal residences even though the Chapter XIII plan theoretically could not provide for secured debts without the consent of the creditor. See *infra*, *Hallenbeck* v. *Penn Mutual Life Insurance Co.*, 323 F.2d 566 (4th Cir. 1963).

> that wind up in bankruptcy are there for causes beyond their control, such as illness, accidents, or job lay-offs. They are not deadbeats, but are honest citizens who need the fresh start that the bankruptcy laws can provide. That is why we do everything we can in this bill to facilitate repayment plans; and for those debtors that are just too far over their heads to attempt a Chapter 13 plan, that is why we give them the full protection of the bankruptcy laws, without the loopholes that have made bankruptcy an ineffective remedy and have frustrated the fresh start for many consumer debtors. 123 Cong. Rec. H11, 690-92, H11, 696-710 (daily ed. Oct. 27, 1977) (remarks of Rep. Edwards).

Congress realized, then, that a major problem with the Act was that creditors were unwilling to give debtors an opportunity to make defaulted obligations current. To remedy that defect, Congress intended that the cure provision of Section 1322(b)(5) include the ability to cure defaulted mortgages. The intent of the Code, which is to rehabilitate debtors and give them a "fresh start", would be defeated if the Code were interpreted in such a manner as to cause most debtors to lose their homes. As the district court in *Taddeo* stated, "it would be contrary to the spirit of Chapter 13 to permit the debtor to lose his residence when the payment of $2,944.78 would cure the default . . ." *In re Taddeo*, 15 B.R. 273, 276 (E.D.N.Y. 1981), *quoting In re Breuer*, 4 B.R. 499, 501 (Bkrtcy. S.D.N.Y. 1980). *See also In re Davis*, 15 B.R. 22 (Bkrtcy. D.Kan. 1981), *aff'd*, 16 B.R. 473 (D.Kan. 1981).

B. *Under the Bankruptcy Act, Bankruptcy Courts Used Injunctive Powers to Provide Relief to Debtors Attempting to Save Their Homes. A Contrary Result in the Present Case Would Thus Frustrate the Intent of the Bankruptcy Reform Act of 1978.*

Under the Bankruptcy Act, the bankruptcy courts used their equitable powers to enjoin foreclosures at any stage of state court proceedings to protect any equity of redemption for the benefit of the debtor's estate. The cases

addressing the issue approach it from the standpoint of whether enjoining the foreclosure proceeding was proper; the Act did not contain a provision comparable to 11 U.S.C. Section 1322(b)(5).

The leading case, *Hallenbeck* v. *Penn Mutual Life Insurance Company*, 323 F.2d 566 (4th Cir. 1963), involved a situation in which the holders of a deed of trust on the debtors' residence started foreclosure proceedings. The debtors filed a petition under Chapter XIII and sought to enjoin the mortgagee's foreclosure proceedings during the pendency of the plan. Although the Act did not allow the inclusion of claims secured by real property, the court held that it could enjoin the foreclosure to protect the equity of redemption. Since the Act provided for retention of jurisdiction by the court over any and all property of the debtor, without qualification as to the character of the property, the court held that it had jurisdiction even if the property interest was the equity of redemption. *Id.* at 569-70.

In holding that the injunction could issue, the court in *Hallenbeck* strongly emphasized the policy inherent in Chapter XIII wage earner plans:

> The general purpose of Chapter XIII is to afford a means of relief and rehabilitation to persons dependent upon their earnings from personal services by providing a method for effecting a composition with creditors, or extension of time to pay debts, or both.
>
> * * * *
>
> In addition to recognizing and giving effect to the plan provisions of the statute granting the injunctive power, the rationale of such decisions (granting the injunctions) is that the legislation is remedial in nature; it should be liberally construed to effect its purpose; i.e., relief to and rehabilitation of debtors; and it is quite apparent that in certain instances the power to enjoin foreclosure proceedings may properly be used to further that purpose.

Id. at 570-71.

See also, In re Freed & Company, 534 F.2d 1235 (6th Cir. 1976) (*Hallenbeck* applied to Chapter XI proceedings); *Chatman* v. *Daugherty*, 527 F.2d 691 (6th Cir. 1975) (injunction issued in Ch. XIII case to stop foreclosure of mechanic's lien on debtor's home); *In re Garrett*, 203 F. Supp. 459 (N.D. Ala. 1962) (mortgage foreclosure enjoined in Chapter XIII proceeding; cited with approval in *Hallenbeck*).

The Ninth Circuit also followed *Hallenbeck* in *In re Thomas J. Grosso Investment, Inc.*, 457 F.2d 168 (9th Cir. 1972), a Chapter X corporate reorganization petition. That bankruptcy was commenced at a time when the debtor's real property had been foreclosed upon and sold; Arizona, like Michigan, has a six month statutory redemption period during which the mortgagor retains legal title. The mortgagee argued that the redemption period could not be stayed under Sections 116 and 148 (presently combined into 11 U.S.C. Sections 362) because the final judgment and sale had extinguished the judgment lien and the debtor-creditor relationship ceased to exist. Instead, the mortgagee argued, a new relationship arose between the debtor and the purchaser.

The court rejected this analysis. It reasoned that a debtor holding a right to redeem does not have a new asset, but rather has legal title, which is the undivided remnant of his mortgagor's interest. As such, the trustee seeks to preserve an old asset rather than acquire a new one.

The court further stated that the stay sections of the Act must be read with regard for the purposes of reorganization: to protect the property of the debtor against threat of loss through execution. "If adequate protection is to be afforded it must remain available so long as the property remains to be protected until final title finally passes from the debtor to the purchaser." *Id.* at 172.

The court in *Grosso* also emphasized the need to properly characterize this type of issue, not as one of the strict nature of the rights of the parties under state

law, but as one of construction under federal law. The court held that "proceedings to enforce a lien" as used in the stay section required a construction that encompassed all proceedings leading to the divestiture of the debtor's title. *Id.* at 172.

It is obvious from the cases decided under the Act that the courts recognized the federal policy of allowing debtors an opportunity to cure the defaults on their homes and implemented that policy under the courts' broad powers, designed to effect that "fresh start." The Code, in its atempt to *increase* the relief afforded debtors, specifically provided such an opportunity by inclusion of Section 1322(b)(5). The reforms of the Code must not be extinguished by the maneuvers of creditors who attempt to circumvent its substance by exalting the form of acceleration clauses and foreclosure proceedings.

C. *The* Glenn *Opinion Represents a Judicial Compromise in the Name of Convenience and Fails to Interpret Federal Bankruptcy Law in Light of Its Overriding Rehabilitative Purposes.*

The *Glenn* court struggled valiantly with what at first blush is a difficult issue. The court was asked to interpret 11 U.S.C. Section 1322, which admittedly was a product of Congressional compromise. Despairing of finding any clear cut statutory language or legislative history pointing to a construction of the statute that is free from challenge, the *Glenn* court chose to take what it characterizes as a pragmatic, compromise position, instead of looking to the overriding rehabilitative purposes of the statute.

The *Glenn* court states:

> The result we reach here is, therefore, primarily a pragmatic one—one that we believe not only works the least violence to the competing concerns evident in the language of the statute but also one that is most readily capable of use. (A-14a).

The *Glenn* court also states:

> The language of the statute is, to us, plainly a compromise as we have earlier mentioned. Picking a

> date between the two extremes is likewise a compromise of sorts. (A-14a).

Petitioners suggest that compromise is basic to the legislative function. It is often necessary in order to have enough votes to enact statutes. Without compromise the work would not get done. Compromise is entirely appropriate in that arena.

The situation is quite different in the case of the judiciary. When faced with questions of statutory construction, it is the court's job to interpret statutes in accordance with their overriding legislative purpose, even when there is room for a contrary construction. As the Second Circuit stated in *Cawley* v. *United States*, 272 F.2d 443 (2d Cir. 1959):

> It is a familiar maxim of statutory interpretation that the court should enforce a statute in such a manner that its overriding purpose will be achieved, even if the words used leave room for a contrary interpretation. See *Markham* v. *Cabell*, 326 U.S. 404 (1945);

The Congressional intent in enacting the new Chapter 13 of the Bankruptcy Code has been stated several times but no where more accurately than in the House Report on the Code, H.R. Rep. No. 595, 95th Cong., 1st Session 116-117 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6077-78:

> The purpose of Chapter 13 is to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period.
>
> * * * *
>
> The benefit to the debtor of developing a plan of repayment under Chapter 13, rather than opting for liquidation under Chapter 7, is that it permits the debtor to protect his assets.
>
> * * * *
>
> The benefit to the creditors is self evident; their losses will be significantly less than if their debtors opt for straight bankruptcy.

Specifically, Section 1322(b)(5) indicates a policy of enabling debtors to save their homes. *In Re Ivory*, 32 B.R. 788, 792 (Bkrtcy. D. Ore. 1983). As stated by the *Ivory* court:

> The rehabilitative purpose of Chapter 13 in general and the literal language of Sec. 1322(b)(5) in particular further support this view. Chapter 13 was intended to give a debtor with regular income the opportunity to reorganize his debts in order to retain his assets, while at the same time repay his debts in accordance with a court approved plan. Sec. 1322 (b)(5) clearly envisions the debtors retention of his primary asset, the family residence. (citation omitted.)

Thus, opting for convenient and pragmatic results the *Glenn* court loses sight of one of the purposes of Chapter 13; namely, affording wage earners the opportunity to retain their primary asset, the residence.

III. A Chapter 13 Debtor May Pay the Entire Redemption Amount Through a Chapter 13 Plan.

Unlike Miller and Glenn, the other debtors who were parties to the decision below, Petitioners Pigloskis offered to "redeem" their homestead by paying the entire redemption amount legally due and owing through their Chapter 13 Plan.

The *Glenn* court rejected this proposition when it adopted its compromise position that a debtor's ability to save his residence through a Chapter 13 Plan is cut-off at the sheriff's sale. In so doing the Sixth Circuit failed to give proper consideration to the rehabilitative purposes of 11 U.S.C. Sections 1322(b)(3) and (b)(10). The Sixth Circuit also did not give consideration to the role of the automatic stay which acts to preserve the bankruptcy estate and the status quo while the Chapter 13 Plan is performed.

A. *The Rehabilitative Purpose of Sections 1322(b)(3) and (b)(10) Mandates That Chapter 13 Debtors May Pay the Entire Redemption Amount Through Their Chapter 13 Plan.*

In Re Kokkinis, 22 B.R. 353 (Bkrtcy M.D. Ill. 1982) identified 11 U.S.C. Sections 1322 (b)(3) and (b)(10) as those provisions which allow the debtor to pay the entire redemption amount through the life of the Chapter 13 Plan.

In so doing the *Kokkinis* court looked to the rehabilitative purpose of Chapter 13, construing 1322(b)(3).

> This court will not permit an acceleration provision to inhibit debtor rehabilitation. The debtors herein propose to cure their default by paying both the arrearages and the remaining balance owed to the plaintiff over the life of their plan. Since Section 1322(b)(3) allows for the curing of any default, this court holds that the debtors are entitled to cure their default in the manner that they have proposed. *Id.* at 355.

The court also found authority for allowing the debtors to pay the redemption amount through their Chapter 13 proceedings in Section 1322 (b)(10) which states that the plan may include any appropriate provisions not inconsistent with Title 11. The court states as follows:

> The debtors also argue that since Chapter 11 expressly allows the de-acceleration of a debt, 11 U.S.C. Section 1124 (1979), a similar right should exist under Chapter 13. This court finds support for this argument in Section 1322(b)(10) of the Bankruptcy Code, which states that the plan may include any other appropriate provisions not inconsistent with Title 11. *See also In Re Taddeo*, 9 B.R. 299 (Bankr. E.D.N.Y. 1981), *aff'd*, 15 B.R. 273 (E.D.N.Y. 1981) . . . *Id.* 355-356

Glenn dismisses *Kokkinis* with little discussion merely stating that most of the reasons that cut against reinstatement of the mortgage terms also argue against redemption. *Glenn.* (A-29a).

However, redemption through a Chapter 13 actually allays most of the concerns expressed by the *Glenn* court.

First, redemption is a clearly recognized right under state law that is at the heart of many foreclosure schemes. It is a specific event that is as identifiable as is the foreclosure sale.

Second, by redeeming, the debtor pays the entire amount bid by the purchaser at the sale minimizing any chilling effects that the rare third party purchaser may have.

Third, redemption through a Chapter 13 Plan has a finite time. Chapter 13 establishes a limit of three years or less for most plans absent cause. 11 U.S.C. Section 1322(c).

Fourth, since redemption would occur only in those states that have redemption periods, a purchaser at a sale will be well aware of the possibility that the remedy is available to the mortgagor. Surprise to the bidder is not an issue.

Thus, careful consideration of the right to redeem under 11 U.S.C. Sections 1322(b)(3) and (b)(10) significantly undermines the *Glenn* rationale. An examination of the role of the automatic stay in conjunction with the redemption arguments further weakens the vitality of *Glenn*.

B. *The Automatic Stay Provisions of the Bankruptcy Code, 11 U.S.C. Section 362(a) are Designed to Maintain the Status Quo, Preserve the Debtors' Estate and Assist in Debtors' Rehabilitation by Tolling State Redemption Periods During the Life of a Chapter 13 Plan.*

Petitioners submit that the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. Section 362(a) operate to toll state redemption periods and allow debtors to pay the entire redemption amount through their Chapter 13 Plan. In rejecting this position *Glenn* cited a line of cases which do not give proper emphasis to the

fundamental purpose of the automatic stay. (A-18a). The stay's purpose is well stated in the legislative history:

> The Automatic Stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives a debtor a breathing spell from his creditors. It stops all collection efforts, harrassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> The Automatic Stay also provides creditors protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation proceeding under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents this. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977), reprinted in 1978 U.S. Code Cong. & News 5787, 6296.

In order to implement the legislative purpose stated above, the automatic stay must be construed liberally to give full protection to debtors and creditors. As stated in *In re Johnson*, 8 B.R. 371, 374 (Bkrtcy. D.Minn. 1981), "too narrow an interpretation of the scope of this section will allow the disintegration of the estate".

Furthermore in light of the broad scope of the automatic stay provisions, convoluted arguments are required to escape its impact. Thus *Glenn* is reduced to arguing that the automatic stay, which forbids any act to obtain possession of property of the estate or to perfect or enforce any lien against property of the estate, does not toll periods of time. This is true even though the running of time periods have the effect of taking property of the estate.

Johnson easily rejected this argument stating:

> This is too restrictive a definition of those terms. "Enforcement" means causing to have effect or making effective. The running of the redemption period is the act which gives effect to a judgment of foreclosure. See Min. Sat. Sec. 588.12. An "act" as used in Section 362 means more than just an overt action by the creditor. It includes all changes in the relationship between the debtor and his creditors. Standing alone, the running of time is an "act" if it triggers a change in the relationship of the parties.

Id. at 374.

Glenn also argues that 11 U.S.C. Section 108(b) precludes 11 U.S.C. Section 362(a) from tolling redemption periods. The theory is Section 108(b) explicitly addresses the running of periods of time and would be superfluous if Section 362 also addresses time limits. This argument is aptly refuted in *In Re H&W Enterprises, Inc.*, 19 B.R. 582, 587 (Bkrtcy. N.D. Iowa. 1982) where the court looked to the plain language of the statutory provisions involved:

> Pertinent time allotments in 11 U.S.C. Section 108 (b) are not completely extraneous as statutory time periods designed to control the Trustee's activity if emphasis is given to the language of 11 U.S.C. Section 108(b) which states that the Trustee has until the end of a specified time period, "*including any suspension of such period, occurring on or after the commencement of the case*", to act. 11 U.S.C. Section 108(b). A suspension of the running of a state law redemption period by 11 U.S.C. Section 362(a) could be considered just such an 11 U.S.C. Section 108(b) "suspension of such period." Under such a reading, the 11 U.S.C. Section 108(b) period would not even begin to run until after the stay was lifted. Given such a reading of the two sections, there is no conflict between 11 U.S.C. Section 108(b) and 11 U.S.C. Section 362(a). (emphasis supplied by the court) (footnote omitted).

In short the *Glenn* opinion cannot withstand close scrutiny. Its arguments against redeeming in a Chapter 13 plan are strained and only serve to undermine the effectiveness of Chapter 13.

CONCLUSION

This petition presents this Court with an opportunity to resolve a theoretical and practical conflict between the circuits, and reaffirm the federal bankruptcy policy to encourage Chapter 13 repayment plans. The Sixth Circuit's opinion in *Glenn* narrowly interprets a federal bankruptcy law that was designed to reform the prior Bankruptcy Act and allow for the curing of mortgage defaults. *Glenn* conflicts with the Second Circuit opinion in *Taddeo*, which reaffirms the federal principles of debtor rehabilitation while adequately protecting creditors. Finally, *Glenn* even restricts the manifest right of a debtor to redeem his homestead under a Chapter 13 Plan. In order to have that conflict resolved, and the scope of Chapter 13 clarified, Petitioners respectfully request that their petition for certiorari be granted.

Respectfully submitted,

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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IN RE: RALPH MILLER,
Debtor,

RALPH MILLER,
Petitioner,

v.

FIRST FEDERAL OF MICHIGAN,
Respondent.

IN RE: EDWARD J. PIGLOSKI AND
MARY L. PIGLOSKI,
Debtors,

EDWARD J. PIGLOSKI AND
MARY L. PIGLOSKI,
Petitioners,

v.

MAXINE WYNN AND MANOR MORTGAGE CO.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 82-3821, 83-1316, 83-1585

IN RE: GERALD DAVID GLENN AND
JANICE SUE GLENN,
Debtors,

THE FEDERAL LAND BANK OF LOUISVILLE,
Creditor-Appellant,
v.

GERALD DAVID GLENN AND
JANICE SUE GLENN, (82-3821)
Debtors-Appellees.

On Appeal from the United States Bankruptcy Court
for the Southern District of Ohio

IN RE: EDWARD J. PIGLOSKI AND
MARY L. PIGLOSKI,
Debtors,

EDWARD J. PIGLOSKI AND
MARY L. PIGLOSKI,
Plaintiffs-Appellants,
v.

MAXINE WYNN AND MANOR MORTGAGE
COMPANY, (83-1316)
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan

IN RE: RALPH MILLER,
Debtor,

FIRST FEDERAL OF MICHIGAN,
Defendant-Appellant,
v.

RALPH HENRY MILLER, (83-1585)
Plaintiff-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan

Decided and Filed April 16, 1985

Before: ENGEL and KRUPANSKY, Circuit Judges; WEICK, Senior Circuit Judge.

ENGEL, Circuit Judge. These three appeals raise similar questions about the point in the foreclosure process at which a Chapter 13 debtor loses the right to cure a default on a real estate mortgage on his principal residence.

In each case, the debtor gave a mortgage on real estate that was subject to foreclosure proceedings. In *In re Gerald David Glenn*, No. 82-3821, the debtors filed their Chapter 13 petition after the mortgagee had obtained a foreclosure judgment but before the property was sold. In *In re Ralph Miller*, No. 83-1585, and *In re Edward J. Pigloski*, No. 83-1316, the debtors filed their petitions after the properties had been sold at foreclosure sales but before the statutory redemption periods had run. The debtors in all three cases seek to protect their interests in the real estate by paying off any arrearages through their Chapter 13 plans and resuming the regular mortgage payments. The mortgagee in each case has objected that this treatment is contrary to the provisions of 11 U.S.C. § 1322(b).

Each appeal also raises at least one additional issue. In *Glenn*, the debtors argue that, pursuant to 11 U.S.C. § 1322(b)(2), their Chapter 13 plan may modify the rights of their creditor because the creditor's security interest is in a parcel that includes not only their principal residence, but also fifty acres of adjoining farmland. Should they not be permitted to reinstate the terms of their mortgages, the debtors in *Miller* and *Pigloski* seek a ruling that would toll the running of the statutory redemption periods for the duration of their Chapter 13 plans. The Pigloskis also claim that they should be allowed to spread the payment of the redemption amount over the entire length of their Chapter 13 plan while the debtor in *Miller* argues that the expiration of the redemption period following the foreclosure sale would constitute a preferential transfer that may be avoided under 11 U.S.C. § 547(b).

I.

GERALD DAVID and JANICE SUE GLENN (82-3821)

In October 1978 the Glenns bought their home and the fifty acres of land on which it is located in Fayetteville, Ohio. They made a $20,000.00 down payment and gave a first mortgage promissory note to the Federal Land Bank of Louisville to finance the balance of the purchase price. The Glenns also delivered a mortgage deed to the bank. The note required the payment of $2850.00 every six months and contained an acceleration clause giving the bank the option to declare the entire debt due and payable immediately should the Glenns fail to make any payments.

The Glenns subsequently failed to make some of the mortgage payments, and the bank accelerated the debt. When the Glenns failed to pay the accelerated amount, the bank commenced foreclosure proceedings. On December 18, 1981, the Court of Common Pleas of Brown County, Ohio entered a foreclosure judgment against the

Glenns for $51,991.95. Later that same day, the Glenns filed their Chapter 13 petition with the bankruptcy court.

Under the terms of their Chapter 13 plan, the Glenns proposed to pay the bank the arrearage on the mortgage over a period of twenty-one months while maintaining current payments outside the plan under the original terms of the note. The bank objected to the plan, arguing that the note and mortgage had been merged and reduced to judgment and that the Glenns currently owed not just the amount they were in arrears but the entire judgment amount. The bankruptcy court overruled the bank's objection and confirmed the plan. Relying upon the rationale of the Second Circuit in *In re Taddeo*, 685 F.2d 24 (2d Cir. 1982), the court held that 11 U.S.C. § 1322 (b)(5) permitted the Glenns to "deaccelerate" their mortgage and reinstate the original payment schedule.

The parties agreed to a direct appeal to our court pursuant to 28 U.S.C. § 1293(b).

RALPH MILLER (83-1585)

On August 5, 1980, Ralph Miller purchased a house in Detroit, Michigan, subject to an existing first mortgage, dated April 17, 1973, held by First Federal of Michigan. The sale price was $26,500.00, and the balance on the mortgage note was approximately $20,900.00.

Following repeated, lengthy lay-offs from his employment, Miller defaulted on the mortgage in 1981. First Federal commenced a foreclosure by advertisement in March 1982, and a sheriff's sale was held on May 14, 1982. First Federal purchased the property for a bid of the balance owing on the mortgage.

On November 2, 1982, before the statutory redemption period expired, Miller filed a Chapter 13 petition and plan. In his plan, Miller proposed to pay the arrearage on the mortgage and to maintain current payments on the note. Miller also moved the bankruptcy court to issue

a stay order tolling the redemption period. The bankruptcy court denied the motion, denied confirmation of the plan, and lifted the automatic stay as to First Federal, allowing the mortgagee to pursue eviction.

Miller appealed these decisions to the district court, and the parties entered into a stipulation to stay proceedings pending appeal. Judge Thornton reversed the bankruptcy court, holding that 11 U.S.C. § 1322(b)(5) permits a Chapter 13 debtor to set aside a foreclosure sale, pay any arrearage, and reinstate the terms of the mortgage when the petition is filed before the redemption period expires.

The parties entered into another stipulation to stay proceedings pending First Federal's appeal of Judge Thornton's decision.

EDWARD J. and MARY L. PIGLOSKI (83-1316)

In May 1981, Edward and Mary Pigloski sought to refinance their house by entering into a loan agreement arranged by Manor Mortgage Company. The house was encumbered by an existing mortgage of $14,500.00, which the mortgagee, Standard Federal Savings & Loan Association, had threatened to foreclose. Following the directions of Manor Mortgage Company, the Pigloskis incorporated themselves and signed a wrap-around mortgage and note to Maxine Wynn. The parties dispute the amount owed on the note, and the Pigloskis claim that it is actually usurious. In any event, the Pigloskis failed to make mortgage payments to Maxine Wynn.

Mrs. Wynn commenced foreclosure by advertisement under Michigan law in October 1981, and a sheriff's sale was held on November 20, 1981.

On April 30, 1982, before the statutory redemption period expired, the Pigloskis filed a Chapter 13 petition and plan. Under their plan, the Pigloskis proposed to pay, over a period of two and one half years, all the

amounts they believed were legally due and owing to Mrs. Wynn. The Pigloskis also filed a motion for a stay order tolling the redemption period. The bankruptcy court eventually held that it had no authority to toll the statutory redemption period.

The Pigloskis appealed the decision to the district court. Judge Boyle held that the automatic stay of 11 U.S.C. § 362(a) does not toll the statutory redemption period and that 11 U.S.C. § 105 does not authorize a bankruptcy court to toll the redemption period. Judge Boyle also held that a foreclosure sale extinguishes the mortgage and, as a result, is not subject to cure under section 1322(b)(5).

II.

11 U.S.C. § 1322(b) outlines the permissible contents of a wage earner plan under Chapter 13 of the Bankruptcy Code. The relevant portions of that section provide:

> (b) Subject to subsections (a) and (c) of this section the plan may—
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> . . . .
>
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims;
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> (3) provide for the curing or waiving of any default;
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> . . . .
>
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;
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> . . . .

The mortgagees do not dispute that subsection (b)(5) permits a Chapter 13 debtor to cure a default on a long-term mortgage on the debtor's principal residence. However, they contend that once the long-term debt has been accelerated, or a foreclosure judgment has been obtained, or a foreclosure sale has occurred, the claim is no longer one "on which the last payment is due after the date on which the final payment under the plan is due" and, therefore, is not subject to cure under subsection (b)(5). Moreover, they argue that allowing the debtor to cure the default and reinstate the terms of the mortgage after any of these events would violate the language of subsection (b)(2), which prohibits modification of the rights of holders of claims "secured only by a security interest in real property that is the debtor's principal residence."

The courts disagree over whether and under what circumstances section 1322(b) allows a cure once a default on a mortgage has triggered acceleration of the debt, a jugment or a sale. The bankruptcy court in *In re Ivory*, 32 Bankr. 788 (Bankr. D. Or. 1983), grouped the differing viewpoints into the following general categories:

> (1) Courts that hold that a debtor may not cure a default once a mortgage debt has been accelerated: *In re Wilson*, 11 B.R. 986 (Bkrtcy.S.D.N.Y.1981); *Matter of LaPaglia*, 8 B.R. 937 (Bkrtcy.E.D.N.Y. 1981); *In re Allen*, 17 B.R. 119, 8 BCD 945 (Bkrtcy. N.D.Ohio 1981).
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> (2) Courts that hold that a debtor may cure a default where the mortgage debt has been accelerated provided that no foreclosure judgment has been entered: *Percy Wilson Mortgage & Finance Corp.* v. *McCurdy*, 21 B.R. 535 (Bkrtcy.S.D. Ohio W.D.1982); *In re Maiorino*, 15 B.R. 254 (Bkrtcy.D.Conn.1981); *In re Pearson*, 10 B.R. 189 (Bkrtcy.E.D.N.Y.1981).
>
> (3) Courts [that] hold that a debtor may cure a default where a state court judgment of foreclosure has been entered provided that no sale has taken

place: *In re Acevedo*, 26 B.R. 994 (D.E.D.N.Y.1982); *In re James*, 20 B.R. 145, 9 BCD 208 (Bkrtcy.E.D. Mich. 1982); *In re Brantley*, 6 B.R. 178 (Bkrtcy. N.D.Fla. 1980).

(4) Courts that place no express limitation on the debtor's right to cure a default after acceleration: *In re Taddeo*, 685 F.2d 24 (2nd Cir. 1982); *In re Sapp*, 11 B.R. 188 (Bkrtcy.S.D.Ohio E.D. 1981); *In re Davis*, 16 B.R. 473 (D.Kan.1981). Or after a judgment has been entered: *In re Young*, 22 B.R. 620 (Bkrtcy.N.D.Ill.E.D.1982); *In re Breuer*, 4 B.R. 499, 6 BCD 136 (Bkrtcy.S.D.N.Y.1980).

(5) Courts that hold that a debtor may cure a default where a foreclosure sale has been held provided that the debtor's right of redemption under state law has not expired: *In re Johnson*, 29 B.R. 104 (Bkrtcy.S.D.Fla.1983); *In re Chambers*, 27 B.R. 687 (Bkrtcy.S.D.Fla.1983); *In re Taylor*, 21 B.R. 179 (Bkrtcy.W.D.Mo.1982); *In re Thompson*, 17 B.R. 748 (Bkrtcy.W.D.Mich.1982).

32 Bankr. at 790. To the fourth group we add the following recent opinions by the Fifth and Seventh Circuits; *Grubbs* v. *Houston First American Savings Association*, 730 F.2d 236 (5th Cir. 1984) (en banc) (holding that a debtor may cure a default after acceleration, but expressing no limit on the right); *Matter of Clark*, 738 F.2d 869 (7th Cir. 1984) (holding that a debtor may cure a default after a judgment of foreclosure that does no more than judicially confirm the acceleration under state law, but expressing no opinion whether the right to cure survives a sale or a judgment of foreclosure in states where the effect of the judgment is different).

Most courts agree that section 1322(b)(5) allows the debtor to cure a default when the mortgagee has not yet accelerated the debt, *see, e.g., In re Pearson*, 10 Bankr. at 193; *In re Hartford*, 7 Bankr. 914 (Bankr. D. Me. 1981), and that the debtor may not reinstate the mort-

gage if the bankruptcy petition is filed after the state redemption period has expired, *see, e.g., In re Ivory*, 33 Bankr. at 791; *In re Thompson*, 17 Bankr. at 751.

The legislative history of section 1322(b) is ambiguous about the scope of the right afforded the debtor to cure a mortgage default. To encourage consumer debtor rehabilitation rather than liquidation, Congress designed Chapter 13 of the Bankruptcy Code to provide greater relief than was available under the former Bankruptcy Act. H.R. Rep. No. 595, 95th Cong., 1st Sess. 116-17 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6076-78. The House Report further explains the chapter's general purpose:

> The purpose of chapter 13 is to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period. In some cases, the plan will call for full repayment. In others, it may offer creditors a percentage of their claims in full settlement. During the repayment period, creditors may not harrass [sic] the debtor or seek to collect their debts. They must receive payments only under the plan. This protection relieves the debtor from indirect and direct pressures from creditors, and enables him to support himself and his dependents while repaying his creditors at the same time.
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> The benefit to the debtor of developing a plan of repayment under chapter 13, rather than opting for liquidation under chapter 7, is that it permits the debtor to protect his assets. In a liquidation case, the debtor must surrender his nonexempt assets for liquidation and sale by the trustee. Under chapter 13, the debtor may retain his property by agreeing to repay his creditors. Chapter 13 also protects a debtor's credit standing far better than a straight bankruptcy, because he is viewed by the credit industry as a better risk. In addition, it satisfies many debtors' desire to avoid the stigma attached to

> straight bankruptcy and to retain the pride attendant on being able to meet one's obligations. The benefit to creditors is self-evident: their losses will be significantly less than if their debtors opt for straight bankruptcy.

Id. at 118.

One of the significant specific changes introduced by Congress in the new legislation was to allow modification of the contract rights of secured creditors under a Chapter 13 plan. H.R. Rep., *supra*, at 124; Bankruptcy Laws Commission's Report, H.R. Doc. 137, pt. 2, 93rd Cong., 1st Sess. 205 (1973). Nevertheless, it is evident upon examining the final language of section 1322(b)(2) that Congress contemplated a different treatment of debts secured only by mortgages on the debtor's principal residence.

One would think that when trying to liberalize the relief to debtors under Chapter 13, Congress would be particularly solicitous of the individual wage earner's ability to save his home. However, it is apparent from the language of section 1322(b) that Congress intended to give a preferred status to certain types of home mortgagees and lienholders, a policy which at first blush would seem at odds with the general thrust of the new act. The question naturally arises: why?

The legislative history says little in terms of political or social philosophy as such. However, it does reveal that the final language of section 1322(b) evolved from earlier language, incorporated in the bill apparently at the behest of representatives of the mortgage market,[1] that would

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[1] This language appeared in the Senate version of the bill, S. 2266, 95th Cong., 2d Sess. § 1322 (1978), not long after Senate committee hearings at which Edward J. Kulik, representing the Real Estate Division of Massachusetts Mutual Life Insurance Company, testified that Chapter 13, as then proposed, might have the unintended effect of restricting the flow of home mortage money. *See Bankruptcy Reform Act of 1978: Hearings on S. 2266 and H.R. 8200 Before the*

have prohibited modification of the rights of all creditors whose claims were wholly secured by mortgages on real property. Although the earlier language did not survive,

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Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 707, 714-15 (1977) (statement of Edward J. Kulik, Senior Vice-President, Real Estate Division, Massachusetts Mutual Life Ins. Co.). Specifically, Mr. Kulik was concerned that provisions (1) allowing modification of rights of holders of secured claims and (2) protecting guarantors and codebtors as well as the Chapter 13 debtor might have this effect. He urged:

> Serious consideration should be given to modifying both bills so that, at the least: One, a mortgage on real property other than investment property may not be modified, and two, providing that the stay of actions against a guarantor or other codebtor is applicable only to guarantees executed after the effective date of the new legislation.

Id. at 714.

In response to Senator DeConcini's comments questioning the severity of the problem, Robert E. O'Malley, Mr. Kulik's counsel, stated:

> With respect to the savings and loans, in particular, and the future prospects for loans to individuals under the proposed bills, there is really only one basic problem. That is, the provision in both bills that provides for modification of the rights of the secured creditor on residential mortgages, a provision that is not contained in present law.
>
> I think the answer to your question is that, of course, savings and loans will continue to make loans to individual homeowners, but they will tend to be, I believe, extraordinarily conservative and more conservative than they are now in the flow of credit.
>
> It seems to me they will have to recognize that there is an additional business risk presented by either or both of these two bills if the Congress enacts chapter XIII in the form proposed, thus providing for the possibility of modification of the rights of the secured creditor in the residential mortgage area.
>
> I think the answer is that they will be much more conservative than they have been in the past.

Id. at 715 (statement of Robert E. O'Malley, Attorney, Covington & Burling).

the statute as finally enacted by Congress clearly evidences a concern with the possible effects the new bankruptcy act might have upon the market for homes. If any other policy objective of Congress was adequate to compete against the objective of protecting wage earners generally, it was a policy to encourage the increased production of homes and to encourage private individual ownership of homes as a traditional and important value in American life. Congress had to face the reality that in a relatively free society, market forces and the profit motive play a vital role in determining how investment capital will be employed. Every protection Congress might grant a homeowner at the expense of the holders of security interests on those homes would decrease the attractiveness of home mortgages as investment opportunities. And as home mortgages decrease in attractiveness, the pool of money available for new home construction and finance shrinks.

On the other hand, Congress was determined not to depart too far from its expressed policy of making wage earner plans more attractive to debtors, especially as an alterantive to full bankruptcy proceedings under Chapter 7. Therefore, the preferred status granted some creditors under section 1322(b)(2) was limited to holders of claims secured *only* by a security interest in the debtor's principal residence. No preferential treatment was given debts secured by property in addition to the debtor's principal residence. Such debts normally are incurred to make consumer purchases unrelated to the home or to enable the debtor to engage in some form of business adventure. In such circumstances the home is mortgaged not for its own sake, but for other purposes, and often is only one of several forms of security given. In a consumer purchase the creditor may also take a security interest in the goods purchased, or in a business transaction, the value of the home may be an insufficient security and, therefore, form only a part of the security package. Congress granted no extra protection for holders of these

types of secured claims, presumably because any impact the bankruptcy laws might have upon them would not seriously affect the money market for home construction or purchase.

Furthermore, in sections 1322(b)(3) and (5), which permit the debtor's Chapter 13 plan to cure defaults, Congress provided no special exceptions for creditors whose claims are secured by a security interest in the debtor's residence. Congress expressly provided that subsection (b)(5), which allows the debtor to cure any default on mortgages that extended beyond the life of the Chapter 13 plan, is to operate "notwithstanding paragraph (2) of this subsection." [2]

We wish Congress had spoken its specific intent more clearly with respect to cases involving acceleration, judgments, or sales. It did not but instead saw fit to speak only in broad terms.[3] As is so obvious from the broad range of the cited lower court decisions, any particular result often reflects the value judgment of the particular court as to which of the two competing values should predominate, or at least which is more attractive under the specific facts of the case at hand. All courts agree that at some point in the foreclosure process, the right to cure

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[2] The Senate added the "notwithstanding paragraph (2)" language to subsection (b)(5) when it amended subsection (b)(2) to prohibit modification of the rights of creditors whose claims are secured only by a security interest in the debor's principal residence.

There is some disagreement about whether the "notwithstanding" clause was necessary. Compare *Grubbs* v. *Houston First American Savings Association*, 730 F.2d 236, 246 (5th Cir. 1984), with *In re Williams*, 11 Bankr. 504, 506 (Bankr. S.D. Tex. 1981). Whether the clause was necessary or not, it does indicate that Congress did not want the language of subsection (b)(2) to interfere with a debtor's right to cure default on a long-term mortgage under subsection (b)(5).

[3] One justification may be found in the fact that state laws, practices and even terminology vary extensively. Any effort to be more specific in one context may only brew uncertainty elsewhere.

a default is irretrievably lost; however, the statute itself provides no clear cut-off point except that which the courts may see fit to create. The closer that point of finality is to the beginning of the process, the greater is the protection accorded the mortgage holder, and, hence, the more attractive the home mortgage becomes as an investment. Conversely, the further down the line the court can reach to protect the debtor from the consequences of his default, the better the debtor's needs are met by the Chapter 13 proceedings, and the more attractive those proceedings become to such debtors.[4]

We despair of finding any clear-cut statutory language or legislative history that points unerringly to a construction of the statute that is free from challenge. Each of the cases and each result reached therein is subject to some objection either in theory or in practice. The result we reach here is, therefore, primarily a pragmatic one—one that we believe not only works the least violence to the competing concerns evident in the language of the statute but also one that is most readily capable of use. The event we choose as the cut-off date of the statutory right to cure defaults is the sale of the mortgaged premises. We pick this in preference to a number of other potential points in the progress of events ranging from the date of first default to the day the redemption period expires following sale. We do so for the following reasons, which admittedly may form a large target for criticism:

(a) The language of the statute is, to us, plainly a compromise, as we have earlier mentioned. Picking a date between the two extremes, is likewise a compromise of sorts.

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[4] We think that the other provisions of section 1322(b) indirectly assist the debtor in his quest to salvage his home. By modifying the terms of some debts and curing defaults generally over a longer period of time without incurring more adverse consequences, a Chapter 13 plan may free up additional money to aid the debtor in curing a default on his home mortgage.

(b) The sale of the mortgaged property is an event that all forms of foreclosure, however, denominated, seem to have in common. Whether foreclosure is by judicial proceeding or by advertisement, and regardless of when original acceleration is deemed to have occurred, the date of sale is a measurable, identifiable event of importance in the relationship of the parties. It is at the heart of realization of the security.

(c) Although the purchaser at the sale is frequently the security holder itself, the sale introduces a new element—the change of ownership and, hence, the change of expectations—into the relationship which previously existed.

(d) The foreclosure sale normally comes only after considerable notice giving the debtor opportunity to take action by seeking alternative financing or by negotiating to cure the default or by taking advantage of the benefits of Chapter 13. Therefore, setting the date of sale as the cut-off point avoids most of what some courts have described as the "unseemly race to the courthouse." Concededly no scheme can avoid that possibility altogether, but the time and notice requirements incident to most sales at least provide breathing room and should deter precipitate action that might be expected if the cut-off date were measured by the fact of notice of acceleration or the fact of filing suit.

(e) Any earlier date meets with the complaint that the rights conferred by the statute upon debtors to cure defaults have been frustrated.

(f) Any later date meets with the objection that it largely obliterates the protection Congress intended for mortgagees of private homes as distinguished from other secured lenders.

(g) Any later date also brings with it the very serious danger that bidding at the sale itself, which should be arranged so as to yield the most attractive price, will be chilled; potential bidders may be discouraged if they cannot ascertain when, if ever, their interest will become finalized.

In so ruling we avoid any effort to analyze the transaction in terms of state property law. Modern practice varies so much from state to state that any effort to satisfy the existing concepts in one state may only create confusion in the next. Thus, in construing this federal statute, we think it unnecessary to justify our construction by holding that the sale "extinguishes" or "satisfies" the mortgage or the lien, or that the mortgage is somehow "merged" in the judgment or in the deed of sale under state law.

III.

A. Section 362(a)—Automatic Stay

The debtors in *Miller* and *Pigloski* argue that the automatic stay provisions of 11 U.S.C. § 362(a) operate to toll the running of the statutory period for redeeming real estate sold at a foreclosure sale. Section 362(a) provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—
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> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have

> been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
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> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
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> (3) any act to obtain possession of property of the estate or of property from the estate;
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> (4) any act to create, perfect, or enforce any lien against property of the estate;
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> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
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> . . . .

An oft-quoted excerpt from the legislative history of section 362(a) indicates the provision's major purposes:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
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> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which

> all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6296-97.

The district courts and bankruptcy courts disagree concerning whether the automatic stay provisions of section 362(a) toll state statutory foreclosure redemption periods. One line of cases has held that the limited automatic extension of time available under 11 U.S.C. § 108 (b)[5] precludes relief under section 362(a). Section 108 (b) provides:

> (b) Except as provided in subsection (a) of this section, if applicable law, an order entered in a proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—
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> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; and
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> (2) 60 days after the order for relief.[6]

In *Bank of Commonwealth* v. *Bevan*, 13 Bankr. 989 (E.D. Mich. 1981), the mortgagor filed a petition for

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[5] Neither Miller nor the Pigloskis have claimed any benefit from the provisions of section 108(b).

[6] In a voluntary case, the entry of the order for relief is the filing of the petition commencing the case. S. Rep. No. 598, 95th Cong., 1st Sess. 28 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5814.

reorganization under Chapter 11 of the Bankruptcy Code following a foreclosure sale of his home. The bankruptcy court had entered an order pursuant to section 362(a), indefinitely extending the statutory redemption period. In reviewing the bankruptcy court's order, the district court noted that "the language of § 362(a) fails to explicitly address the running of time periods," *id.* at 992, while section 108 explicitly grants the trustee additional time in which to perform acts such as redemption. Reading the two sections together, the court held that the automatic stay provisions of section 362(a) do not override the extension of time provision in section 108(b). The court reasoned:

> An interpretation of § 362(a) as an indefinite stay of the statutory period of redemption would render § 108(b) superfluous. If § 362(a) automatically stays the running of the statutory right to redeem until the stay is lifted pursuant to § 362(c) or (d), the pertinent time allotments of § 108(b) are completely extraneous as statutory time periods designed to control the trustee's activity. Moreover, if § 362(a) is interpreted to provide for the automatic stay of time periods for an indefinite amount of time, then subsections (a) and (b) of § 108, which define minimum and maximum time periods for the trustee to act, directly conflict with § 362(a).

Id. at 994. The court concluded that "where one section of the Bankruptcy Code explicitly governs an issue, another section should not be interpreted to cause an irreconcilable conflict." [7] *Id.*

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[7] Although it determined that the bankruptcy court incorrectly cited section 362(a) as the basis for its order tolling the redemption period, the district court affirmed the bankruptcy court's action, holding that the stay was a permissible exercise of the broad grant of discretionary authority embodied in section 105. 13 Bankr. at 996. That aspect of the *Bevan* opinion is discussed at Part III.B., *post*, at 24.

Several courts have agreed with the *Bevan* court's interpretation of sections 108(b) and 362(a). *See, e.g., Johnson* v. *First National Bank*, 719 F.2d 270, 278 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1015 (1984); *In re Cucumber Creek Development, Inc.*, 33 Bankr. 820 (D. Colo. 1983); *In re Martinson*, 26 Bankr. 648 (D. N.D. 1983); *Matter of Markee*, 31 Bankr. 429 (Bankr. D. Idaho 1983); *In re Construction Leasing & Investment Corp.*, 20 Bankr. 546 (Bankr. M.D. Fla. 1982); *In re Murphy*, 22 Bankr. 663 (Bankr. D. Colo. 1982).

In a recent case, the Bankruptcy Court for the Western District of Michigan considered whether the automatic stay of section 362(a) tolls the statutory redemption period in the context of Chapter 13. *In re Wallace*, 33 Bankr. 29 (Bankr. W.D. Mich. 1983). The debtor in *Wallace* had filed her Chapter 13 petition and plan following the foreclosure sale of her residence. In her plan, which was confirmed by the bankruptcy court, the debtor had proposed to make current payments on the mortgage on her residence outside the plan and to cure the default by making payments on the arrearage within the plan. When the debtor failed to make her payments under the plan, the bankruptcy case was dismissed. Approximately a month after the dismissal, the mortgagee notified the debtor that the redemption period had expired and asked her to vacate the house. The debtor refused, and the mortgagee sought a declaratory judgment that it was entitled to immediate possession of the property. The debtor argued, *inter alia*, that the automatic stay of section 362(a) had tolled the redemption period until the stay terminated upon dismissal of the case. The bankruptcy judge noted his earlier decision in *In re Thompson*, 17 Bankr. 748 (Bankr. W.D. Mich. 1982), that a Chapter 13 debtor could cure an arrearage and reinstate his mortgage even though a foreclosure sale had occurred before the petition was filed. However, he held that the right to cure and reinstate a mortgage was not based on

any tolling of the redemption period. The bankruptcy judge concluded:

> To adopt the tolling theory as proposed by Wallace could lead to results in Chapter 13 cases never intended by Congress. Thus, following the cases cited by her, the tolling period would cease when the discharge was granted in a completed case and thereafter when the redemption time had expired, even though a debtor were current in payments, the foreclosure sale would be final.
>
> Therefore, I would hold that upon filing the petition, the automatic stay would only prevent action to recover possession and upon completion of the plan, the default would be cured and the position of the debtor and creditor would be the same as though the foreclosure had never occurred. If, however, the plan is not completed on dismissal, the mortgagee would have the same rights that he would have had if no Chapter 13 petition had been filed.

33 Bankr. at 32.

Another line of cases, anchored by *In re Jenkins*, 19 Bankr. 105 (D. Colo. 1982), and *In re Johnson*, 8 Bankr. 371 (Bankr. D. Minn. 1981), takes the position that the automatic stay provisions of section 362(a) should be liberally construed to suspend the running of a statutory period of redemption. In *Johnson* an involuntary petition under Chapter 7 was filed against the mortgagor after three pieces of his real estate had been sold at a foreclosure sale. Following a hearing on a motion to prevent the running and termination of the redemption period, the bankruptcy court held that the automatic stay of section 362(a) operated to toll the redemption period. Because the legislative history of section 362(a) indicated that Congress intended to alter the scope of protection afforded by the stay provisions under the old Bankruptcy

Act,[8] the court reasoned that the scope of section 362(a) could not be determined by reliance on cases decided under old law. Finding that the provisions of section 362(a) should be construed liberally "to give full protection to the debtor and creditors," 8 Bankr. at 374, the court held that the redemption period was tolled by three separate subsections of section 362(a): subsection (a)(2), which stays "the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case"; subsection (a)(3), which stays "any act to obtain possession of property of the estate or of property from the estate"; and subsection (a)(4), which stays "any act to create, perfect, or enforce any lien against property of the estate." The court found no conflict between its interpretation of section 362(a) and the language of section 108(b). It held that the specific language of section 108(b) allowing the trustee time to act before "the end of such period, *including any suspension of such period occurring on or after the commencement of the case*," (emphasis added) expressly recognizes that the running of time may be suspended under section 362(a). Therefore, the *Johnson* court reasoned that section 108(b) did not govern the issue.

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[8] The court relied specifically on this statement from House Report No. 595:

> The provisions in the current Bankruptcy Act for a stay of actions against the debtor and his property upon the commencement of a bankruptcy, reorganization, or repayment plan case are inadequate . . . The stay is an important aspect of bankruptcy protection, and is an element of the debtor's fresh start. . . .
>
> . . . The automatic stay in H.R. 8200 differs in some ways from the stays provided by the Rules of Bankruptcy Procedure today. The new stay expands coverage in some areas, reduces it in others, and clarifies many uncertain aspects of the current provisions.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 174 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 6135 (footnotes omitted).

In *Jenkins*, the district judge did not discuss the relationship between section 108 and section 362; however, he did hold that in the context of a Chapter 11 proceeding, the automatic stay provisions of section 362(a)(1) and (a)(4) tolled the Colorado redemption period and prohibited the purchaser at the foreclosure sale from applying for a public trustee's deed on the property involved.

The district judge in *Jenkins* has subsequently altered his position on the automatic stay issue. In *In re Cucumber Creek Development, Inc.*, 33 Bankr. 820 (D. Colo. 1983), he specifically considered whether the automatic stay provisions of section 362 could apply to toll a statutory redemption period in the face of the more specific provisions of section 108:

> I have had an opportunity in the past to address this question in a slightly different context. *In Re Jenkins*, 19 B.R. 105 (D.C. Colo. 1982). There, I ruled that § 362(a)'s automatic stay tolled the state redemption period to preserve "those property rights which I have found to be possessed by the debtor at the time of filing." 19 B.R. at 110. In *Jenkins*, however, I did not discuss or consider the applicability of 11 U.S.C. § 108 to such a case. Given an opportunity to consider the question here and to review the body of case law which has developed, I now conclude that § 362(a) is inapplicable, and that state redemptive rights may be preserved and extended only to the extent provided by § 108.

33 Bankr. at 821.

Both *Johnson* and *Jenkins* were expressly disapproved by the only court of appeals to consider whether section 362(a) might apply to toll a statutory redemption period. *Johnson* v. *First National Bank*, 719 F.2d 270, 275 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1015 (1984). In *First National Bank*, the mortgagors filed a joint petition for reorganization under Chapter 11 approximately three

weeks before the expiration of the redemption period on their property that been sold at a foreclosure sale. Relying upon 11 U.S.C. § 105, the bankruptcy court enjoined the mortgagee from taking any further action to foreclose the property and ordered that the running of the statutory redemption period be stayed until further order or until the bankruptcy cases concerning the property were closed. The district court affirmed, and the mortgagee appealed. On appeal the debtors argued that although the district court relied solely upon section 105(a), the provisions of section 362(a) and section 108(b) also supported the bankruptcy court's order. With respect to section 362(a), the Eighth Circuit accepted the reasoning in *Bank of Commonwealth* v. *Bevan* and expressly rejected the position taken in *In re Jenkins* and *In re Johnson*. The court found that the "clear majority" of cases decided under various automatic stay provisions of the old Bankruptcy Act held that the filing of a petition in bankruptcy did not toll or extend the running of a statutory period of redemption. Finding no clear manifestation of congressional intent to change the law on the issue, the court assumed that the newly-enacted statute, whose language was substantially identical to that of the previous statutes, was harmonious with existing law and its judicial construction. Moreover, the court found that the presence of section 108(b) in the Code supported its determination that section 362(a) did not apply to toll the Minnesota statutory redemption period.

We find ourselves in agreement with the reasoning of the Eighth Circuit in *First National Bank* and are reinforced in our conclusion by the belief that inter-circuit conflicts should be avoided wherever it is possible to do so in good faith and in reason.

B. Section 105(a)

The debtors in *Miller* and *Pigloski* also contend that 11 U.S.C. § 105(a) empowers bankruptcy courts to issue

separate stay orders tolling statutory redemption periods. That section provides:

> (a) The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

The minority position on this issue is set forth in *Bank of Commonwealth* v. *Bevan*, 13 Bankr. 989 (E.D. Mich. 1981). *See also Bank of Ravenwood* v. *Patzold*, 27 Bankr. 542 (N.D. Ill. 1982). After holding that section 362(a) did not apply, the district court in *Bevan* upheld the bankruptcy court's order tolling the statutory redemption period as a permissible exercise of authority under section 105. Relying on two cases decided under the Bankruptcy Act, the court found that the broad grant of power in section 105 authorized a bankruptcy judge, in appropriate situations, to grant the trustee "a greater period of time in which to act than § 108 initially authorizes." 13 Bankr. at 996.

Several courts have taken a contrary position, holding that section 105(a) may not be invoked to toll or suspend the running of a statutory redemption period absent fraud, mistake, accident, or erroneous conduct on the part of the foreclosing officer. *Johnson* v. *First National Bank*, 719 F.2d at 274; *In re Martinson*, 26 Bankr. 648, 654 (D. N.D. 1983); *Matter of Markee*, 31 Bankr. 429, 432 (Bankr. D. Idaho 1983); *In re James*, 20 Bankr. 145, 150-51 (Bankr. E.D. Mich. 1982); *In re Headley*, 13 Bankr. 295, 297-98 (Bankr. D. Colo. 1981). In *First National Bank*, the Eighth Circuit reversed a district court judgment that had affirmed a bankruptcy court order entered under section 105(a) tolling the Minnesota redemption period. The court found that the equitable powers granted a bankruptcy court by section 105(a) are quite broad, but not unlimited. Specifically, the court found that, "absent a specific grant of authority from Congress or exceptional circumstances, a bank-

ruptcy court may not exercise its equitable powers to create substantive rights which do not exist under state law." 719 F.2d at 274. The court concluded that to allow a bankruptcy court, as a matter of course, to suspend the running of a statutory period of redemption under section 105(a) would enlarge the debtor's property rights "beyond those specifically set forth by the Minnesota legislature and by Congress in § 108(b)." *Id.* The Eighth Circuit was further persuaded by the fact that there was no claim of wrongdoing that adversely affected the debtor's ability to redeem the property within the statutory period:

> "[E]quity is available to protect property rights of the innocent debtor from the wrongful acts of other persons; however, equity does not extend to situations in which the debtor is simply unable to make the required payment within the prescribed time."

Id. at 275 (quoting *In re Headley*, 13 Bankr. 295, 297 (Bankr. D. Colo. 1981)).

The bankruptcy court in *In re James*, 20 Bankr. 145 (Bankr. E.D. Mich. 1982), offered another reason for not interpreting, section 105(a) to permit a bankruptcy court to toll state redemption periods as a matter of course. The court found it "clear" that section 105(a) and its predecessor, section 2(a)(15) of the Bankruptcy Act, were intended to affect parties' actions rather than state statutes:

> "The chief test under . . . § 2(a)(15) appeared to be whether or not the proceeding in the nonbankruptcy court sought to be enjoined interfered with the possession or custody of the bankruptcy court or unduly impeded or embarrassed the court in its administration under the Act."

20 Bankr. at 149-50 (quoting 2 *Collier on Bankruptcy* ¶ 105.02 (15th ed.)). Absent some compelling justification, the court declined to use its equitable powers to

interfere with state law by extending the redemption period.

Once again we are persuaded by the reasoning in *First National Bank*, and we note that the trend in the laws seems to be away from allowing bankruptcy courts to issue orders tolling statutory redemption periods under authority of section 105(a). We also observe that the cases construing section 105(a) to confer no power to toll redemption periods absent exceptional circumstances appear to be more carefully reasoned than those holding to the contrary.

IV.

The debtors in each of these appeals have raised additional separate issues which we now address.

A. The Farm Property Claim.

Our decision on the principal issue in this appeal likely will moot the question whether the residence of the Glenns should be treated separately from the fifty acres of farmland upon which it is located because the Glenns will be able to pursue their Chapter 13 plan as they propose. However, in the interest of completeness we address it briefly.

The Glenns' argument rests on the language of section 1322(b)(2). According to that section a plan may "modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtor's principal residence . . .*" (emphasis added). The Glenns argue that since the creditors have a security interest in all of the land the Glenns own, including the fifty acres of farmland surrounding the house, the creditors do not have a claim secured only by real property that is the debtor's principal residence. The Glenns maintain, in other words, that the fifty acres of land on which their house is located are not part of their principal residence.

The only case we have found to address this issue is *In re Ballard*, 4 Bankr. 271 (Bankr. E.D. Va. 1980). After noting that neither of the debtors was engaged in farming and that the debtors received only $40 a month of income from the farm, the court in *Ballard* said that "in the absence of a showing that the Debtors clearly use the farm for any principal purpose other than their residence, [this court] must consider the entire . . . property as their principal residence." *Id.* at 276.

This reasoning is even more persuasive here. It is undisputed that the Glenns do not use the fifty acres for any purpose other than as their principal residence. If the Glenns do not in fact put the land to any other use, it is difficult to see why the land should be found to be anything but a part of their residence for the purposes of Chapter 13.

B. Redemption Under the Chapter 13 Plan

The debtors in *Pigloski* claim that even if they are not allowed to reinstate the terms of their mortgage under 11 U.S.C. § 1322(b)(5), they are permitted, under section 1322(b)(3) to spread payment of the redemption price over the entire length of their Chapter 13 plan. The Pigloskis cite *In re Kokkinis*, 22 Bankr. 353 (Bankr. N.D. Ill. 1982), to support this proposition.

In *Kokkinis* the mortgagors filed their Chapter 13 petition after their residence had been sold at a foreclosure sale and one day before the statutory redemption period expired. The debtors proposed to pay both the arrearage and the entire remaining balance owed to the mortgagee over the life of their plan. The primary issue was whether the provisions of section 1322(b) allowed the debtors to cure default after pre-petition acceleration of the mortgage debt. The court held that they did. The court distinguished two cases in which the debtors had been precluded from curing arrearages following foreclosure sales because the debtors in those cases wanted

to reinstate the original payment plans under mortgages while the debtors in *Kokkinis* proposed to pay off the entire debt during the life of their plan.

Although it is possible in theory, to hold that a Chapter 13 debtor is entitled to pay the redemption amount over the life of his plan and also to hold that the statutory redemption period is not tolled by the bankruptcy proceedings,[9] the practical effect of allowing the debtor to pay the redemption amount over an extended period would in many respects be the same as a suspension of the redemption period. Furthermore, most of the considerations that cut against allowing the debtor to reinstate the mortgage terms after a foreclosure sale also argue against allowing the debtor to pay off the redemption amount over the life of the plan. We, therefore, decline to accept this view.

C. Preferential Transfer Under 11 U.S.C. § 547(b)

As an alternative basis for affirming the district court in his case, the debtor in *Miller* argues that the expiration of the redemption period following a foreclosure sale would constitute a preferential transfer that may be avoided under 11 U.S.C. § 547(b). The mortgagee in *Miller* argues that this is a new issue not raised or briefed in the lower courts and that it ought not to be decided without a full opportunity for briefing and litigation in the lower courts. The mortgagee also argues that the debtor violated court rules by raising an issue in his appellee brief when he had not given notice that the issue would be raised before the briefs were written.

This is a novel issue at best and one which was neither raised nor briefed in the lower courts. It implicates en-

[9] See *In re Wallace*, 33 Bankr. 29 (Bankr. W.D. Mich. 1983), in which the bankruptcy judge rejected a tolling theory even though he had held in an earlier case that section 1322(b) allows a Chapter 13 debtor to cure a default and reinstate the terms of a mortgage after a foreclosure sale has occurred.

tirely new provisions of the Bankruptcy Code and factual issues which were neither developed nor otherwise addressed in that context. It would be entirely inappropriate for us to consider that issue in this appeal. *Bannert* v. *American Can Company*, 525 F.2d 104, 111 (6th Cir. 1975).

V.

In summary, we hold that under 11 U.S.C. § 1322(b) a Chapter 13 debtor may cure a default on a mortage on his principal residence even when the debt has been accelerated and a judgment of foreclosure has been entered provided that no foreclosure sale has taken place. Once the property has been sold, the right to cure the default and reinstate the terms of the mortgage under section 1322(b) ceases. We also hold that the automatic stay provisions of 11 U.S.C. § 362(a) do not toll or extend the running of state statutory periods of redemption following foreclosure sales. Moreover, 11 U.S.C. § 105(a) does not empower the courts to issue separate orders tolling statutory redemption periods absent exceptional circumstances such as fraud, mistake, accident, or erroneous conduct. Finally, we hold that section 1322 (b)(3) does not permit debtors to spread payment of redemption amounts over the entire life of their Chapter 13 plans.

Applying the foregoing principles to the specific cases on appeal, we reach the following dispositions:

GLENN (82-3821). While the mortgagee had succeeded in obtaining a judgment of foreclosure, sale of the premises had not occurred at the time the Chapter 13 petition was filed. Accordingly, the judgment of the bankruptcy court overruling the bank's objections and confirming the plan of the debtors is AFFIRMED.

MILLER (83-1585). Because the sheriff's sale had already been held before the Chapter 13 petition was filed, the bankruptcy court was correct in lifting the auto-

matic stay as to First Federal. Therefore, the judgment of the district court is VACATED and we REMAND to the district court with directions to remand to the bankruptcy court for reinstatement of the order from which appeal was taken to the district court and for further proceedings consistent with this opinion.

PIGLOSKI (83-1316). As in *Miller*, the sheriff's sale in this case was held before the debtors filed their Chapter 13 petition. District Judge Boyle was, therefore, correct in ruling that the automatic stay provisions of 11 U.S.C. § 362(a) did not toll the statutory redemption period and in holding that, following the foreclosure sale, the mortgage default was not subject to cure under section 1322 (b)(5) apart from paying the redemption price within the period prescribed by state law. Accordingly, the judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-1585

IN RE: RALPH MILLER,
Debtor.

RALPH MILLER,
Plaintiff-Appellee,
v.

FIRST FEDERAL OF MICHIGAN,
Defendant-Appellant.

[Filed Jun. 3, 1985]

Before: ENGEL and KRUPANSKY, Circuit Judges, and WEICK, Senior Circuit Judge

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ JohnP. Hehman
JOHN P. HEHMAN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-1316

EDWARD J. PIGLOSKI and MARY L.PIGLOSKI,
Plaintiffs-Appellants,

v.

MAXINE WYNN and MANOR MORTGAGE COMPANY,
Defendants-Appellees

[Filed Jun. 3, 1985]

Before: ENGEL and KRUPANSKY, Circuit Judges, and WEICK, Senior Circuit Judge

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ JohnP. Hehman
JOHN P. HEHMAN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-1585

IN RE: RALPH MILLER,
Debtor.

FIRST FEDERAL OF MICHIGAN,
Appellant,

v.

RALPH HENRY MILLER,
Appellee.

[Filed Apr. 16, 1985]

Before: ENGEL and KRUPANSKY, Circuit Judges, and WEICK, Senior Circuit Judge

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby vacated and the case is remanded to the said district court with directions to remand to the bankruptcy court for reinstatement of the order from which appeal

was taken to the district court and for further proceedings consistent with this opinion.

It is further ordered that Appellant recover from Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

/s/ JohnP. Hehman
JOHN P. HEHMAN
Clerk

Issued as Mandate: June 11, 1985

COSTS: None

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Bankruptcy No. 82-06216

Consolidated Civil Nos. 82-74539 - 83-0335

IN RE: RALPH MILLER

RALPH MILLER,
Debtor-Appellant,

—v—

FIRST FEDERAL OF MICHIGAN,
Appellee.

OPINION

These cases are before the Court on appeal from an Order Denying a Stay Tolling the State Redemption Period entered by the Bankruptcy Judge on November 9, 1982, and an Order Denying Confirmation of the Debtor's Chapter 13 Plan entered January 24, 1983. The November 9, 1982 Order denied extension of a six-month statutory redemption period that began to run following a sheriff's foreclosure sale of the residential property of the debtor on May 14, 1982. When the redemption period ran on November 14, 1982, this then became the basis for the denial of the debtor's Chapter 13 plan. Debtor appellant contends on appeal that the Bankruptcy Reform Act of 1978 permits a debtor to cure a default, even after foreclosure, so long as the default involves property of the estate subject to the Bankruptcy

Court's jurisdiction, and, that the redemption period following a foreclosure sale under Michigan law may be tolled pursuant to provisions of the Bankruptcy Reform Act of 1978.[1]

The undisputed facts as set forth by the debtor-appellant are:

> On or about August 5, 1980, the Debtor, RALPH MILLER, purchased a house and lot located at 18645 Teppert, in the City of Detroit, State of Michigan, subject to an existing first mortgage, dated April 17, 1973, held by First Federal of Michigan. The sales price was $26,500.00, and the balance on the mortgage note was approximately $20,900.00.
>
> Primarily due to repeated and lengthy lay-offs from his employment with Chrysler Corporation, the Debtor defaulted on this mortage in late 1981. He was thereafter unable to cure the default under the terms mandated by the mortgagee. A foreclosure by advertisement was commenced in March, 1982. The sheriff's sale was held on May 14, 1982. First Federal of Michigan was the only bidder at the sale; their bid was the balance owing on the mortgage.
>
> Prior to the expiration of the redemption period, the Debtor, on November 2, 1982, filed a Chapter 13 Petition and Plan. The Plan proposed by the Debtor would provide payments to the mortgage company to cure the default and current monthly mortgage payments.
>
> Immediately upon filing the Chapter 13 Petition, Debtor filed a Motion for Stay Order Tolling Redemption Period and Restraining Order, in which he requested the Bankruptcy Court to issue a Stay

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[1] For clarification, this Court follows the now common practice of referring to the Bankruptcy Act of 1898 as the "Act" and the Bankruptcy Reform Act of 1978 as the "Code".

Order Tolling the Redemption Period under *Bank of the Commonwealth v. Bevan*, 13 Bankr. Rptr. 989 (E.D. Mich. 1981). The Bankruptcy Court heard and denied the Motion on November 9, 1982. The Court adopted the opinion set forth in, *In re James*, 20 Bankr. Rptr. 145 (Bankr. E.D. Mich. 1982), holding that § 105 does not authorize a bankruptcy court to toll a state statutory period of redemption.

At the Confirmation Hearing held on January 11, 1983, the Court also denied confirmation of the Debtor's Chapter 13 Plan. The Court further ordered that the automatic stay as to First Federal of Michigan was lifted, allowing the mortgagee to pursue eviction. Finally the Court ruled that 11 U.S.C. § 362 did not toll the redemption period and the debtor could not cure a default after a sheriff's sale.

Upon stipulation of the parties, this Court entered an Order on December 21, 1982, Staying Proceedings pending this appeal for which oral arguments were heard March 2, 1983.

The residential property involved in this action constitutes "property of the estate" and is therefore within the jurisdiction of the Bankruptcy Court. 11 U.S.C. § 541; 4 Collier on Bankruptcy ¶ 541.07[1] (15th Ed. 1980). This is so because the debtor's interest in real property subsequent to a foreclosure sale includes the right of redemption which allows the debtor a statutorily prescribed period of time to "redeem" the property from the purchaser at the sale. MCLA §§ 600.3101 *et. seq.*, 600.3201 *et. seq.*; MSA §§ 27A.3101 *et seq.*, 27A.3201 *et seq.* This interest of the debtor includes retention of legal title in the premises by the mortgagor until the expiration of the period of redemption. *Bankers Trust Company of Detroit v. Rose*, 322 Mich. 256 (1948).

While the nature and extent of the debtor's interest in real property is determined by application of state law,

the Bankruptcy Code defines those interests in property which become the "property of the estate" and hence within the Bankruptcy Court's jurisdiction. As the period of redemption had not expired at the time the Chapter 13 petition was filed in this case, the right to redeem became property of the estate by operation of 11 U.S.C. 541 [2] as of the time of filing.

The first issue this Court is confronted with is whether an acclerated mortgage debt falls within § 1332(b)(5) of the Bankruptcy Code which allows a debtor to pay off a mortgage arrearage (cure a default), during the life of the debtor's reorganization plan while maintaining current payments.

Section 1322(b) reads in pertinent part:

> (b) Subject to subsections (a) and (c) of this Section, the [Chapter 13] Plan may—
>
> * * * *
>
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims;
>
> * * * *
>
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on *which the last payment is due after the date on which the final payment under the plan is due* . . .

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[2] Section 541 of the Bankruptcy Code defines "property of the estate" as follows:

> (a) The commencement of a case under Section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all of the following property, wherever located:
>
> (1) except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

The analysis which has made § 1322(b) unavailable to debtors in the position of Ralph Miller [3] is that a default cannot be cured under this section because the last payment of the accelerated mortgage is due before the time in which the final payment is due under the reorganization plan. Bankruptcy Courts have therefore held that an accelerated mortgage debt is not within § 1322(b)(5). *In re Paglia*, 8 Bankr. 937 (BCED N.Y. 1981); *In re Butchman*, 4 Bankr. 379 (BCSD N.Y. 1980); *In re Rutterbush*, Civ. Ac. No. 81-40270 (decided September 24, 1982, E.D. Mich.) (Newblatt J.)

The Court of Appeals of the Second Circuit has addressed the issue within the context of accelerated mortgages without specifically addressing a post-foreclosure sale situation. *In re Taddeo*, 685 F.2d 24 (2nd Cir. 1982) However, in *Taddeo* the Court rejected the mortgagee's claim that the debtors could not use § 1322(b)(5) to cure their default and maintain payments in that (b)(5) applies only to claims whose last payment is due after that under the plan, by holding that the concept of "cure" in § 1322(b)(5) contains the power to deaccelerate. 685 F.2d at 26, 28. As to the mortgagee's contention that to allow a debtor to cure the default as proposed would violate prohibitions against modification of home mortgages set forth in § 1322(b)(2), the Court pointed out that in light of legislative history and legislative purpose, the "notwithstanding paragraph (2)" clause was added to § 1322(b)(5) to emphasize that defaults in mortgages could be cured notwithstanding § 1322(b)(2). *Id* at 27, (citing 124 Cong. Rec. H 11, 1106 (Sept. 28, 1978); S.17, 423 (Oct. 6, 1978)). The Court pointed out, however, that the clause was not neccessary as the Senate protected home mortgages from *modification* in its bill S.2266, 95th Cong. 2d. Sess., but evinced no intent to protect these mortgages from *cure*.

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[3] The debtor Ralph Miller defaulted on mortgage containing a standard acceleration clause.

Id. at 27-28. The Court further noted that the few cases under the successor Chapter XIII of the old Bankruptcy Act distinguish modifying a claim from maintaining payments thereon, and indicate that curing a default and maintaining payments on a claim did not modify a plan. Id. at 28, (citing *Hallenbeck v. Penn Mutual Life Insurance Co.* 323 F.2d 566 (4th Cir. 1963)).

Two Bankruptcy Courts in Michigan have reached contrary results in addressing the issue of the ability to cure a default under § 1322(b)(5). In *In re James*, 20 Bankr. 145 (BCED Mich. 1982), Judge Graves stated that "because a foreclosure sale under Michigan law extinguishes the mortgage and transfers legal title to the purchaser", [citing, *Ledyard v. Phillips*, 47 Mich. 305 (1882)[4]], "the mortgagor is left with its statutory right to redeem from the sale within six months thereof pursuant to MCLA § 600.3140." 20 Bankr. at 149. Therefore, because payment can no longer occur in accordance with the due date on the mortgage, but, at the most, can only be made within six months from the date of foreclosure, Judge Graves concluded that, "by its own terms § 1322(b)(5) is inapplicable" since the statute requires fulfillment of the terms of the reorganization plan prior to the date of the final payment under the mortgage. *Id.* Without further analysis of the treatment of secured debts under the Bankruptcy Act of 1898, or legislative history and purpose, or the intent of Congres, Judge Graves eliminated the remedies contained in § 1322(b)(5) for debtors whose mortgages had been accelerated and were the subject of foreclosure sales.

In *In re Thompson*, 17 Bankr. 748 (BCWD Mich. 1982), the Court accurately noted that while Michigan

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[4] It is clear that since the establishment of a redemption period under Michigan law, the prevalant view is that legal title remains with the mortgagor. *Bankers Trust Company of Detroit v. Rose, supra.*

law limits a mortgagor's ability to cure a default where a debt has been accelerated or a sale held, case law under § 1322(b) is in disagreement on the question of whether the Bankruptcy Code deviates from state law in allowing a post-default cure. 17 Bankr. at 751. The *Thompson* Court adopted the view that § 1322(b)(5) allows the cure of arrearages and the reinstating of the original mortgage terms where the debtor files a petition prior to such time as state law cuts off the debtor's interest in the mortgaged property, i.e. the running of the statutory redemption period under Michigan law. *Id.* In so ruling, the Court reviewed provisions of the Bankruptcy Act which allowed that secured creditors need not be required to participate in Chapter XIII plans without their consent and that real estate mortgages were not "claims" for Chapter 13 purposes, (§§ 652,606). The Court noted, however, that subsequent case law held that secured creditors could be delayed in the enforcement of their liens where the effectuation of the Chapter XIII plan so required, (*Hallenbeck v. Penn Mutual Life Insurance Co., supra*). 17 Bankr. at 751-52. The Court then noted that the legislative history of 11 USC § 1322 nowhere indicates that this approach has been altered, and the Court therefore found that the protections given the secured creditor under the Bankruptcy Code are confined to that specified in the Code and identified in *Hallenbeck. Id.; see also, Taddeo,* 685 F.2d at 27-28. These protections, for a debt secured by real estate where the last payment is due after the last plan payment, include that the debt must be brought current within a reasonable time, § 1322(b)(5); that the mortgagee is to receive regular payments at the contract rate, § 1322(b)(2); and that the mortgagee receive the assurance of continued security, §§ 362(d)(1), 1322(b)(2). In *Thompson,* as in the present case, the creditor had not alleged that its security would be impaired by the debtor's plan, and the plan proposed to bring the mortgages current and to continue regular payments.

The mortgage in the present case strenuously argues that the decisions in *Taddeo* and *Thompson* misconstrue the relationship between the Bankruptcy Code and state law and ignore the mandate that property rights must be defined under the laws of Michigan. Appellee contends that under Michigan law, after the foreclosure sale the note and mortgage have merged into the sheriff's deed and cease to exist; that the mortgagor retains only a right of redemption during the statutory period of redemption after a foreclosure sale and the equity of redemption passes to the purchaser, which he may assign or transfer. (Appellee's Brief on Appeal, at 10, 11). The mortgagee questions the Court's ability to impair the rights of the bidder if the Court "reinstates a mortgage which ceased to exist" or "orders the successful bidder to reconvey this interest in the property to the mortgagor." (*Id.* at 12). This argument fails to account for the interest the debtor retains until the expiration of the redemption period, and, whether legal title in fact becomes property of the estate of a Chapter 13 petition, the legal title has *not* vested in the purchaser until such time as the period allowed for redemption expires. *Bankers Trust Company of Detroit v. Rose*, 322 Mich. 256 (1948). The debtor's power to cure a default on a mortgage by application of § 1322(b)(5) continues until such time as state law cuts off the debtor's interest in the property, and is not limited by the contract terms which allow for acceleration or even foreclosure sale until the redemption period expires.

This is consistent with the rehabilitative purposes which underlie Chapter 13. And, as pointed out in *Thompson*:

> Furthermore such a reading as is proposed by the mortgagees would virtually eliminate subsection (b)(5) from the Code. In nearly every instance in which a homeowner debtor files a petition in Chapter 13, the mortgage debt has been accelerated. To suggest that such a debtor's remedy is limited to payment of the full amount of the mortgage debt is to

> render the remedy in § 1322(b)(5) unavailable to all but a select number of debtors. Furthermore, such a reading would encourage mortgagees to accelerate a debt as soon as possible after any default occurs in order to improve their position should the mortgagor file Chapter 13 proceedings.

17 Bankr. at 753.

The argument of the mortgagee herein is that the Court in *Thompson* fails to understand Michigan foreclosure laws and the significance of pre and post-foreclosure rights of the creditor. This argument amounts to that put forth by the mortgagee in *Taddeo*, i.e. that because a mortgagee can accelerate a mortgage, or, in this case, sell by foreclosure, the debtor can only cure as provided by state law. As the Court in Taddeo pointed out, "this interpretation of § 1322(b) would leave the debtor with fewer rights under the Bankruptcy Code than under the old Bankruptcy Act of 1898,"[5] and "[d]efaulting mortgag[ors] would forfeit their right to cure even before the start of foreclosure proceedings, before they have hired lawyers and therefore before they knew anything about their rights under Chapter 13." 685 F.2d at 29. Application of state law as proposed by the mortgagee herein would override the rehabilitative purpose of Chapter 13.

This being the case, we will not address the issue of the tolling of the statutory redemption period beyond that automatically invoked upon the filing of the Chapter 13 petition.[6] Once filed, a Chapter 13 petitioner has avail-

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[5] See, *In re Freed & Co.*, 534 F.2d 1235, 1239 (6th Cir. 1976).

[6] Section 362(a) of the Bankruptcy Code provides in pertinent part:

> (a) Except as provided in Subsection (b) of this section, a petition filed under Section 301, 302, or 303 of this title operates as a stay applicable to all entities, of—
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, ad-

able the protection of § 1322(b)(5) upon the Court's consideration of the proposed reorganization plan and within the confines of the section itself as it protects creditors.[7]

In accordance with the above reasoning the Court finds that the Bankruptcy Court erred in its denial of the appellant's Motion for Stay and rejection of the proposed reorganization plan. Accordingly, this Court will vacate the decision of the Bankruptcy Court and remand this case for proceedings consistent with this Opinion. An appropriate Order will be entered.

/s/ Thomas P. Thornton
THOMAS P. THORNTON
United States District Judge

Dated: July 18, 1983

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ministrative, or other proceedings against the debtor that was or could have been commenced before the commencement of the case under the title, or to recover a claim against the debtor that arose before the commencement of the case under this title; * * *

(3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

[7] While we decline to stay this matter pending clarification from the Court of Appeals for the Sixth Circuit, we are mindful that two decisions of this Court, *In re Rutterbush*, civ. ac. no. 81-40270 (decided September 24, 1982, E.D.Mich) (Newblatt J.) and *In re Johnson*, civ ac. no. 82-73814 (decided December 15, 1982) (Boyle J.) have taken the contrary view of the effect of § 1322(b)(5) in post-foreclosure sale cases on appeal from denials of stay by the Bankruptcy Court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Bankruptcy No. 82-06216

Consolidated Civil Nos. 82-74539 and 83-0335

IN RE: RALPH MILLER

RALPH MILLER,
Debtor-Appellant,

—v—

FIRST FEDERAL OF MICHIGAN,
Appellee.

ORDER

This matter having come before the Court on appeal from a decision of the Bankruptcy Court, and the Court having reviewed the briefs of the parties and heard the oral arguments of counsel, being otherwise fully advised in the premises and for the reasons set forth in the Opinion herein attached

The decision of the Bankruptcy Court is hereby VACATED and IT IS ORDERED that this case be REMANDED to the Bankruptcy Court for proceedings consistent with the attached Opinion.

/s/ Thomas P. Thornton
THOMAS P. THORNTON
United States District Judge

Dated: July 18, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Honorable Patricia J. Boyle
Civil Action No. 82-71868
Bankruptcy No. 82-02536-G

EDWARD J. PIGLOSKI and MARY L. PIGLOSKI,
Debtors-Appellants,

—vs—

MAXINE WYNN and MANOR MORTGAGE COMPANY,
Appellees.

MEMORANDUM OPINION AND ORDER AFFIRMING ORDER OF BANKRUPTCY

This is an appeal from a bankruptcy decision of Judge Graves denying appellant's request to stay or toll the statutory redemption period for payment under a wrap-around mortgage. Appellants are consumer debtors who secured a mortgage in June, 1981. After four months of accumulated arrearage, appellants defaulted, and appellee commenced a foreclosure by advertisement, and a sheriff's sale was conducted on November 20, 1981. On April 30, 1982, appellants filed a motion for a stay order tolling the redemption period. The redemption period was due to expire on May 20, 1982. Judge Graves granted the motion and conducted a hearing on May 18, 1982, at which time the court considered appellants' contention that the automatic stay provision of 11 U.S.C. § 362(a) applies to toll the running of the redemption period, and in the alternative that under the authority of *Bank of the Commonwealth v. Bevan*, 13 Bankr. 989 (E.D. Mich.

1981) (Guy, J.), the bankruptcy court has the authority to issue a separate stay order tolling the redemption period pursuant to 11 U.S.C. § 105. Pursuant to its own opinion in *In re James*, 20 Bankr. 145 (Bankr. E.D. Mich. 1982), the court rejected both contentions. Appellant now appeals that decision. Judge Graves issued a stay pending appeal as to this ruling.

First with respect to the automatic stay provision, section 362(a) provides in relevant part:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, . . . operates as a stay, applicable to all entities, of—
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> . . . .
>
> (3) any act to obtain possession of property of the estate or of property from the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate . . . .

While I recognize the important function served by this automatic stay provision in the Bankruptcy Code, that of giving the "debtor a breathing spell from his creditors," *see* H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 340 (1977), 1978 U.S. Code Cong. & Ad. News, pp. 5963, 6296-97, I join with Judge Guy and with the judges of the bankruptcy court in concluding that this section does not apply to the "act" of the running of the redemption

period in that section 108 speaks explicity to suspension of time periods. See *Bevan, supra.* As was noted in *Bevan*:

> Section 108(b), as it effects [sic] the amount of time given the trustee to file "any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act," grants the trustee a minimum of sixty days or the running of the period, whichever is longer, in which to act.
>
> Under the language of § 362(a), an automatic stay applies to "acts", "proceedings", and their "continuation", and "enforcement" of judgments against the debtor or property of the estate, *and does not effect the running of specific time periods* unlike § 108 which speaks explicitly to that issue . . . .
>
> . . . While a stay tolling the running of the statutory period would give the debtor greater protection than that contemplated by § 108, this court finds that where one section of the Bankruptcy Code explicitly governs an issue, another section should not be interpreted to cause an irreconcilable conflict. *Richards v. United States,* 369 U.S. 1, 11 (1969).

Id. at 993-94. The court concluded that to give effect to the automatic stay provisions of section 362(a) and to hold that an indefinite and automatic stay is applicable to toll the running of the redemption period would render the explicit limitations of section 108 "superfluous." I agree with that reasoning and conclude, as the bankruptcy courts have (at least implicitly), pursuant to the *James* decision, that section 362(a) does not toll the runing of the statutory period of redemption.

Appellant argues alternatively that section 105 of the Code provides a means to toll the redemption period. Under 11 U.S.C. § 105, "(a) The bankruptcy court may issue any order, process, or judgment that is necessary

or appropriate to carry out the provisions of this title." This court finds, however, that this broad grant of authority under section 105 must be read in conjunction with the limiting provisions of 11 U.S.C. § 108(b), which provide:

> [I]f applicable law, an order entered in a proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; and
>
> (2) 60 days after the order for relief.

Consistent with the analysis which underpins the holding in *Bevan*, the broad remedial provisions of section 105 must give way to the explicit sixty-day limitations period in section 108 so as to avoid an irreconcilable conflict between these two sections. As was noted by Judge Newblatt recently in *In re Rutterbush*, No. 81-40270 (E.D. Mich. Sept. 24, 1982):

> Section 108(b) is a clear Congressional command that the rights of a redemption purchaser can be stayed for no longer than sixty days. It is a basic Constitutional Article III premise that Congress can regulate the range of judicial review provided that Congress acts within the bounds of the Constitution. Nobody would seriously contend that it is unconstitutional for Congress to limit the tolling period with respect to redemption purchasers to a mere sixty days. Accordingly, section 108(b) must be given

> effect [notwithstanding appellant's request for a thirty-month stay pursuant to section 105].

Slip op. at 3. Appellant in the instant matter prayed for a *Bevan*-type stay, pursuant to section 105, presumably for an indefinite period of time. Having concluded that section 105 is limited, if not overruled, by section 108, the order of the bankruptcy court denying appellant's request for a stay pursuant to 11 U.S.C. § 105 is hereby affirmed.

Appellant argues further that, pursuant to 11 U.S.C. § 1322, the trustee may cure the "consequences" of default even after the expiration of the redemption period and that the "consequences" may include the acceleration of the mortgage and the "curing" of the foreclosure sale.

An analysis of the question of whether a trustee may cure the consequences of a mortgagor default, including a foreclosure sale, must begin with an analysis of what occurs upon a foreclosure sale. The title conveyed by foreclosure sale is all the right, title, and interest in and to the mortgaged premises which the mortgagor possessed at the time the mortgage was executed, or which was subsequently acquired by him. *Stolte v. Krentel*, 271 Mich. 98, 105 (1935) *cited in James*, 20 Bankr. at 148.

> A foreclosure of a mortage extinguishes it. When the amount due under the mortgage is paid to the mortgagee by the purchaser at the sheriff's sale, the lien is destroyed, and the purchaser becomes the owner of an equitable interest in the mortgaged premises which ripens into a legal title if not defeated by redemption as provided by law.

Dunitz v. Woodford Apartments Co., 236 Mich. 45, 49 (1926). While it is clear that a mortgagor retains the right to redeem until the redemption period runs, *see Heimerdinger v. Heimerdinger*, 299 Mich. 149 (1941), this statutory provision vests in the mortgagor only the

right to redeem by depositing with the mortgagee or purchaser "the sum which was bid therefor, with interest from the time of the sale at the rate per cent, borne by the mortgage . . . ." M.C.L.A. § 600.3240. The right to redeem is distinct, however, from the right *to cure* a default, which is the right to resume the normal payment schedule upon the payment of arrearages owing. A foreclosure sale is most analogous to a judgment by foreclosure in that it vests in the purchaser of the mortgage, or the mortgagee, an expectation of full title upon the expiration of the redemption period if the mortgagor fails to redeem. *James*, 20 Bankr. at 148. A foreclosure sale and final judgment by foreclosure are essentially in the same category, distinct from an acceleration of the mortgage, as consequences of default. The former occurrences extinguish the mortgage and are, hence, not subject to cure under section 1322(b)(5). *In re Taddeo*, 9 Bankr. 299 (Bankr. E.D.N.Y. 1981), *aff'd*, 685 F.2d 24 (2d Cir. 1982). *Contra In re Thompson*, 17 Bankr. 748 (Bankr. W.D. Mich. 1982).

In sum, I conclude, as the court did in *James*, that there is indeed a distinction between the acceleration of a debt and a foreclosure sale in that the latter terminates the mortgage and consequently terminates the mortgagor's rights under the mortgage, other than that of redemption. As was noted in *James*, where the mortgage is no longer in existence and where title in the mortgage has passed to the purchaser, the requirement under section 1322(b)(5) that "the last payment is due after the date on which the final plan is due" is not satisfied for the simple reason that there is no longer a mortgage, and hence, no payments are "due". As Judge Graves described in *James*, "[d]ebtors cannot reactivate a mortgage that was already merged into a judgment of foreclosure before the debtors filed their Chapter 13 petition. . . . [A] Bankruptcy Court 'cannot cultivate rights where none can grow . . . .'" *In re James*, 20 Bankr. 149 (ellipsis in original).

Accordingly, this court concluding that the trustee may not cure the default after a foreclosure sale pursuant to section 1322(b)(5), that aspect of the order of the bankruptcy court is likewise affirmed.

IT IS SO ORDERED.

/s/ Patricia J. Boyle
PATRICIA J. BOYLE
United States District Judge

Date: 29 Mar. 1983
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Docket Number 82-71868

Hon. Patricia J. Boyle

EDWARD J. PIGLOSKI, *et al.*

v.

MAXINE WYNN and MANOR MORTGAGE CO.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the decision of the Bankruptcy Court is affirmed; that the Appellants Edward J. Pigloski and Mary L. Pigloski take nothing; and that the action be dismissed on the merits.

ROBERT A. MOSSING
Clerk

/s/ Mary W. Farin
Deputy Clerk

Date—3-31-83
Detroit, Michigan

APPENDIX C

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Chapter 13 No. 82-06216-W

IN RE: RALPH MILLER,
Soc. Sec. No. 369-28-7174
Debtor.

ORDER DENYING DEBTOR'S MOTION FOR STAY ORDER TOLLING REDEMPTION PERIOD AND RESTRAINING THE WAYNE COUNTY SHERIFF FROM ISSUING A SHERIFF'S DEED

At a session of said Court, held in the City of Detroit, County of Wayne and State of Michigan. On: Dec. 2, 1982

Present: HONORABLE GEORGE E. WOODS,
Bankruptcy Court Judge

Debtor's Motion for Stay Order Tolling Redemption Period and Restraining the Wayne County Sheriff from Issuing a Sheriff's Deed came on for hearing before the Honorable George Woods on November 9, 1982. Debtor, appeared through his attorney Mary Ann Zito, Esq., and Defendant, through William Stanley Fambrough, Esq.

Upon consideration of the pleadings filed herein and the argument of counsel,

IT IS HEREBY ORDERED that Debtor's motion is denied for the reasons stated in *In Re: Troy Lee James, et al*, Bankruptcy Reporter (1982).

/s/ George E. Woods
Bankruptcy Court Judge

Approved as to form:

/s/ W. Stanley Fambrough
W. STANLEY FAMBROUGH

/s/ Matthew J. Mason
MATTHEW J. MASON

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Chapter 13 No. 82-06216-W

IN RE: RALPH MILLER,
Debtor,

RALPH MILLER,
Appellant,

v.

FIRST FEDERAL OF MICHIGAN,
Appellee.

ORDER GRANTING RELIEF FROM AUTOMATIC STAY AND DENYING CONFIRMATION

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan.

ON: 24 Jan. 1983

Present: HONORABLE GEORGE E. WOODS,
Bankruptcy Court Judge

The matter having come on for confirmation hearing on January 11, 1983, and it appearing that First Federal of Michigan has filed objections to the Plan because it had foreclosed the mortgage in question by Sheriff's sale on May 14, 1982 prior to the date of filing the Chapter 13, and the court finding that 11 USC 362 does not toll the redemption period, and that the debtor may not cure a mortgage default after Sheriff's sale;

IT IS HEREBY ORDERED THAT the objection filed by First Federal of Michigan is sustained.

IT IS FURTHER ORDERED that the automatic stay is lifted.

IT IS FURTHER ORDERED that Debtor's motion for confirmation is denied.

/s/ George E. Woods
Bankruptcy Court Judge

Approved as to form and content:

/s/ Matthew J. Mason
MATTHEW J. MASON (P-29678)
Attorney for Debtor
UAW LEGAL SERVICES PLAN
200 New Center Building
Detroit, Michigan 48202

/s/ W. Stanley Fambrough
W. STANLEY FAMBROUGH
Attorney for First Federal of Mich.
1001 Woodward Avenue
Detroit, Michigan 48226

TRANSCRIPT OF PROCEEDINGS
MAY 18, 1982

[19] I'd like to say that the briefs were so well done that it makes the job easy but because they're so good, it makes it harder, and this is an issue that's been argued almost every other week since I've become a Judge.

At the first of this year, and as the parties are aware, I have had a number of cases on the docket that are under advisement on this issue, and these people were contacted, and directed to be here this morning for the announcement of an Opinion, and for the sake of moving this matter along, and other matters that are under advisement.

It appears that the matter of Edward J. and Mary L. Pigloski will be the first one to be disposed [20] of in this fashion.

The ruling that the Court is now about to announce is taken from the Opinion that will be issued today in the matter of Troy Lee James, 81-04754-G; McDavid Hathorn 81-04163-G; Marilyn Blacksher, 81-06484-G; Rebecca R. Brown, 81-07213-G, Adversary Number 82-0172. This Opinion will be in final form today, and will be available for the both of you, and for Counsel in those cases that I've just put into the record.

As far as the four cases just announced, I'm not going to discuss the facts in those cases. The facts in this case are equally applicable to the Opinion, and I see no reason, based on what I've heard and read, to change what I'm now about to announce.

The question presented by the consolidated cases that I've referred to, as well as the matter of Edward Pigloski and Mary Pigloski, as simply stated, turn to a single issue.

Does the United States Bankruptcy Court have authority to issue an order pursuant to 11 U.S.C., Section 105, and my other stautory Sections that may be restated, to toll a stautory period of redemption, so as to allow a

Chapter 13 Debtor to reinstate the terms of the mortgage legally in default in a plan pursuant to 11 U.S.C., Section 1322 (b) (5).

This point concerns Section 105, and the other statutory Sections presented in the arguments in this [21] in this case, and in the other cases. Section 105 does not empower a Bankruptcy Court to toll a state stautory period of redemption so as to enable the Chapter 13 Debtor to reinstate the terms of the mortgage in default in the plan pursuant to 11 U.S.C., Section 1322 (b) (5).

Section 1322 (b) (5) allows the cure of any default within a certain period of time. Subject to subsections (a) and (b) of this Section, the plan may: (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time, and maintenance of payments while the case is pending on any unsecured claim, or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

Section 105 allows the Court to issue any Order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

The Debtors would have this Court believe that Sections 1322 (b) (5) and 105 (a) support the proposition that a mortgage allegedly in default, but which, in fact, has been foreclosed, may properly be revived, and the original terms reinstated in the plan of reorganization, especially where it is averred that the properties are necessary to an effective reorganization. This proposition, however, finds no basis in law or in equity.

First and foremost Section 1322 (b) (5) [22] directly affects state-created property rights which were to be arranged under the support of 440, United States, Report 48, at page 55: property interests are created and defined by state law. Unless some federal interest requires a different result, t'ere is no reason why such interests should be analyzed diff- differently simply because an interested party is involved in a Bankruptcy proceeding. Uniform treatment of property interests by both State

and Federal Courts, within a State, serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving a windfall merely by reason of the happenstance of bankruptcy.

Under Michigan law, a purchaser at a foreclosure sale takes the property subject to the mortgagor's right of statutory redemption. That is Ledyard versus Phillips, 47 Mich. 305, a decision made a hundred years ago, 1882, which is still the law of this state.

The title thus conveyed to the purchaser is all the right, title and interest in the mortgaged premises which the mortgagor possessed when the mortgage was executed.

In Stolte versus Krentel, 271 Mich. 98, this title vests in the purchaser only upon the expiration of the stautory redemption period.

Bankers Trust Company of Detroit versus Rose, 322 Mich. 256. The mortgagor still retains a [23] significant amount of interest in the premises, in addition to its stautory right of redemption; specifically, the right to possession, and the right to rents and profits, until the redemption period expires. You might add that the purchaser has an interest to proceed in that regard.

The purchaser at the foreclosure sale also has an interest to be protected. Section 1322 (b) (5) apparently allows a mortgage allegedly in default to be cured, and the original terms to be reinstated in the plan when the last payment on the mortgage is due after the date on which the final payment under the plan is due.

The legislative history states that a claim secured by the Debtors principal residence may be treated with under 1322 (b) (5). This section is applicable only where the debtor/mortgagor's equity of redemption has not been foreclosed. Because a foreclosure sale under Michigan law extinguishes the mortgage and transfers legal title to the purchaser, Ledyard versus Phillips, the mortgagor is left with its stautory right to redeem from the sale within six months pursuant to M.C.L.A. 600.3140, as amended by 1970 Public Act 86.

Therefore, payment can no longer occur in accordance with the due date on the mortgage but, at the most, can only be made within six months from the date of foreclosure as statutorily prescribed.

Hence, by it's own terms, 1322 (b) (5) [24] is inapplicable, since that statute requires fulfillment of the terms of the plan prior to the date of the final payment under the mortgage.

Th principle has been most succinctly stated that debtors cannot reactivate a mortgage that was already merged into a judgment of foreclosure before the Debtors filed their Chapter 13 petition. A Bankruptcy Court cannot cultivate rights where none can grow.

As to the individual Debtors in the cases under advisement, and in this case, their properties were sold at foreclosure sales, and their mortgages extinguished thereby, all occurring prior to the filing of their Chapter 13 petitions.

Because payments can no longer be made in accordance with the due dates on the mortgages, the inevitable conclusion is that the terms of their respective mortgages cannot be reinstated in the proposed plans of reorganization under 1322 (b) (5).

Counsel for Debtors in other cases, and in this case, have argued that even if Section 1322 (b) (5) precludes an opportunity for cure, this Court should, nevertheless, exercise its equitable powers under 11 U.S.C., Section 105, and issue an Order tolling Michigan's statute of redemption in order to allow the Debtors to make current their arrearages, and to continue to make monthly mortgage payments while under the [25] protective umbrella of Chapter 13.

This Court is unwilling to transcend the boundaries within which we may exercise our equity powers and, therefore, we find that Section 105 does not authorize this Court to toll a state stautory period of redemption.

Although a Bankruptcy Court is a Court of equity, and as such may invoke equitable principles, limitations on the exercise of those equitable powers do, in fact, exist.

Section 105, upon which the Debtors in part rely, provide that the Bankruptcy Court may issue any Order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

The legislative history to this code provision states that Section 105 is derived from Section 2a(15) of the Act. The same principles of equity and limitations thereon that exist under the Code, also existed under the Act. "A Bankruptcy Court is a Court of equity, and is guided by equitable doctrines and principles, except insofar as they are inconsistent with the Act."

Section 2a(15) of the Bankruptcy Act was viewed as an express legislative sanction of the Bankruptcy Courts power to enjoin actions of parties.

That Section 2a(15) was intended to effect parties' actions rather than state statutes is clear: "the chief test under section 2a(15) appeared to be whether or [26] not the proceeding in the non-bankruptcy Court sought to be enjoined interfered with the possession or custody of the Bankruptcy Court or unduly impeded or embarassed the Court in its administration under the Act." That language is from 2 Collier on Bankruptcy at 105-4, fifteenth edition.

Section 105 of the Bankruptcy Code retained this broad grant of equitable powers, but at the same time, caution is urged. The basic intention of the section is to enable the Bankruptcy Court to do whatever is necessary to aid its jurisdiction, anything arising in, or relating to, a Bankruptcy case.

Debtors at bar do not put forth any evidence of interference with, or impairment of, this Courts jurisdiction. Rather, the argument is the Debtors would have this Court interfere with a States legislative judgments concerning the rights of parties to a mortgage agreement, and no compelling justifications for such interference exist.

The Debtors in these cases, and in the case today, are asking the Court to enter into a revision of State law that is properly the concern of the Michigan Legislature.

If the State of Michigan wishes to extend the time for redemption of property after a foreclosure sale, it is well within the province of the Michigan Legislature to pass such a bill. It is well within the power of the Governor of the State of Michigan to sign it into law.

[27] The Legislatures silence on this issue is a clear indication to the Court of a disinclination to change the six month redemption period, and this Court is not about to step into the arena and revise the statute.

Cases invoking equitable principles and relief generally involve situations where fraudulent conduct has occurred, or where a manifest injustice would occur absent equitable relief.

Equity is available to protect property rights of the innocent debtor from the wrongful acts of other persons, however, equity does not extend to situations in which the debtor is simply unable to make the required payment within the prescribed time. That language is from Headley, 13 Bankruptcy Reports, 295, a decision of the Bankruptcy Court in Colorado in 1981.

The decision of the United States District Court for the Eastern District of Michigan, in Bank of the Commonwealth versus Bevan, 13 Bankruptcy Report, 989, decided in 1981, holds, in part, that Sections 105 and 108 of the Code grant Bankruptcy Courts the authority to stay the running of the redemption period for sixty days.

Bevan does not discuss the ordinary meaning of the words contained in Section 108 (b) or its effect on Michigan's Statutory Redemption Period.

An ordinary reading of Section 108 (b) [28] reveals no express or specific provision granting Bankruptcy Courts the authority to stay the running of the States redemption period for sixty days, as suggested in Bevan, or indefinitely, as urged by the Debtors in the instant cases.

It may be argued that Section 108 (b) gives this Court the authority to enter a sixty day stay so that the Debtor may cure a default, but this argument must give way to

the State protected property interest, and the deference Federal Courts must give to State Law in this case.

Under State Law there is no default to be cured after the mortgaged premises have been sold at a foreclosure sale. The Debtors only remedy is to make full payment of the price of the successful bid at the foreclosure sale. The opportunity to sure the default exists after foreclosure, but before foreclosure sale.

Section 108 (b) cannot be read to revive the opportunity to cure a default after the foreclosure sale without abrogating clearly established State Law. We are not willing to rewrite the foreclosure statute, or try to revive the opportunity to cure a default when done after the foreclosure sale.

With respect to the cases under consideration, no wrongful acts, fraud, or unfairness have been established by anything that's been presented in Court. The Debtors freely entered into mortgage agreements with their [29] respective creditors. At the time the notes and mortgages were executed, the Plaintiff creditors expected that payments would be timely made, while the Debtors expected that they would possess their premises conditioned upon the ability to satisfy the loan obligations.

Upon foreclosure sale, Michigan law allows the Debtors, as a matter of privilege, six months to redeem from the sale. The purchasers at the sale in the cases under advisement, the Plaintiffs, have the right to expect either repayment of the bid price together with accrued interest during the redemption period, or the vesting of legal title at the expiration of the redemption period.

Action by this Court which would thwart state policy, and diminish the parties expectations, is not warranted by the facts presented in the cases under advisement, or this case.

Thus, this Court may not issue an Order pursuant to 11 U.S.C., Section 105 (a) which tolls Michigan's statutory redemption period.

I'll have your Order entered in accordance with this Opinion.

* * * *

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Chapter 13 No. 82-02536-G

IN THE MATTER OF EDWARD J. PIGLOSKI
Soc. Sec. No. 382-36-4484

MARY L. PIGLOSKI
Soc. Sec. No. 373-42-7067

Debtors.

ORDER DISSOLVING TEMPORARY RESTRAINING ORDER AND PROHIBITING THE INCLUSION OF DEBTORS' PERSONAL RESIDENCE IN A FILED CHAPTER 13 PLAN NUNC PRO TUNC TO MAY 18, 1982 AND STAYING EFFECT

At a session of said Court, held in the City of Detroit, Wayne County, State of Michigan, 27 Aug. 1982.

Present: Honorable RAY REYNOLDS GRAVES, Judge in Bankruptcy

The matter having come before this Court on a Motion of the Debtors herein, both parties having submitted written briefs and oral arguments heard on both May 12, 1982 and May 18, 1982, the Court having been fully advised in the premises and the Court having found that the Court is without the authority over the Debtors' principal residence to allow its inclusion in the Debtors' Chapter 13 Plan, or to issue an injunction staying the running of the state statutory right of redemption where the residence has been foreclosed, sold at sheriff sale and that the Debtors' only remaining right is that of a statutory right of redemption;

IT IS HERBEY ORDERED that the Temporary Restraining Order issued May 3, 1982, by the Honorable Ray Reynolds Graves be hereby dissolved;

IT IS FURTHER ORDERED that the Court does not have the authority to affect or modify the mortgagee's rights in the principal residence of the Debtors or to issue an injunction tolling the running of the state statutory right of redemption;

IT IS FURTHER ORDERED that Maxine Wynn and Manor Mortgage Company, their attorneys, agents, assigns or any person acting on their behalf are entitled to, and may therefore commence or continue any further summary proceedings for eviction against Edward J. and Mary L. Pigloski from the property in question at 35503 Marroco Drive, Mt. Clemens, Michigan;

IT IS FURTHEF ORDERED that in accordance with Stay Order Pending Appeal and Restraining Order, entered by this Court on May 20, 1982, the effect of this Order is stayed pending appeal.

/s/ Ray Reynolds Graves
RAY REYNOLDS GRAVES
Judge in Bankruptcy

Approved as to Notice and Form:

/s/ Mary Ann Zito
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85-196 (3)

No. ———

Supreme Court, U.S.
FILED
SEP 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

IN RE: RALPH MILLER,
Debtor,

RALPH MILLER,
Petitioner,
v.

FIRST FEDERAL OF MICHIGAN,
Respondent.

IN RE: EDWARD J. PIGLOSKI and
MARY L. PIGLOSKI,
Debtors,

EDWARD J. PIGLOSKI and
MARY L. PIGLOSKI,
Petitioners,
v.

MAXINE WYNN and MANOR MORTGAGE CO.,
Respondents.

On Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals

---

RESPONDENT'S BRIEF IN OPPOSITION

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20 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Does 11 U.S.C. Section 1322(b)(5) give a debtor authority to set aside a forecloseure sale of his residence, to reinstate the original mortgage loan terms and to cure the loan default through a Chapter 13 plan where the bankruptcy petition was filed after the foreclosure sale?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. ———

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Debtor,

RALPH MILLER,

Petitioner,

v.

FIRST FEDERAL OF MICHIGAN,

Respondent.

IN RE: EDWARD J. PIGLOSKI and
MARY L. PIGLOSKI,

Debtors,

EDWARD J. PIGLOSKI and
MARY L. PIGLOSKI,

Petitioners,

v.

MAXINE WYNN and MANOR MORTGAGE CO.,

Respondents.

On Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals

---

RESPONDENT'S BRIEF IN OPPOSITION

ARGUMENT

I. There is no conflict between the decisions of the Second and Sixth Circuits.

Petitioners seek to base their petition on an alleged conflict between the Second and Sixth circuits. There is no conflict. It was argued to the Second Circuit in *Taddeo*, 685 F.2d 24 (2d Cir. 1982) that, once a default in the long-term installment loan occurred and the lender had accelerated the remaining principal balance, the loan had been converted into an obligation similar to a demand instrument and was no longer subject to the provisions of Section 1322(b)(5) of the Bankruptcy Code.[1] This section, if taken literally, only applied to those loans ". . . on which the last payment is due after the date on which the final payment under the plan is due." Since the loan payments could not possibly, after acceleration, extend beyond the plan, the debtor[2] could not rely on this section as authority to cure the default and reinstate the loan terms.

The *Taddeo* Court rejected this argument primarily for two reasons. It was concerned about the lack of notice to the borrowers of the acceleration and, consequently, the borrower's inability to consult with an attorney before Section 1322(b)(5) was lost as an option to the borrower. Secondly, it believed that if Section 1322(b)(5) could be so easily side-stepped it would become unavailable to all but a select few. The Court held that acceleration of the debt, by itself, was not sufficient to render Section 1322(b)(5) unavailable to the borrower.

---

[1] The Bankruptcy Act of 1898 will be referred to as the "Act" and the Bankruptcy Reform Act of 1978 will be referred to as the "Code".

[2] For the most part, a debtor in Chapter 13 has the same powers as a trustee in Chapter 7 or 11. Therefore references herein to "debtor" or "trustee" should be read as interchangeable as the context warrants.

The *Taddeo* court used, without qualifying it, overly broad language to explain its holding. (Pet. p. 13). What the court failed to state (perhaps because the issue wasn't before it) is that there must come a point in time where the debtor has waited too long to undo the contractual consequences of the default. It would seem obvious that the Court did not mean to suggest that the right to cure a default should exist as an absolute right, impervious to the running of time and to changes in legal relationships. The *Glenn* opinion 760 F.2d 1428 (6th Cir. 1985) recognizes that there is a point where the borrower has waited too long to assert his right to cure the default through a Chapter 13 bankruptcy case. These two cases are not in conflict. They are addressing the situation at two different points in time. In *Taddeo*, the lender had commenced foreclosure proceedings but had not obtained a final judgment of foreclosure and sale. In *Glenn* the lender had already conducted the foreclosure sale. So far, under both the Bankruptcy Act and Code, no circuit court decision has held that a debtor may set aside a foreclosure sale and reinstate his mortgage.

Another reason to draw the line at the foreclosure sale has been advanced by *In re Young*, 48 B.R. 678 (Bkrtcy. E.D. Mich. 1985) which points out that the purchaser at a foreclosure sale is not the holder of a secured claim at all. Section 101(4) of the Code defines "claim" as a right to payment or to an equitable remedy for breach of performance. The purchaser at a foreclosure sale does not enter into a contractual relationship wherein he has the right to demand either from the mortgagor. The only thing the purchaser owns is equitable title which will ripen into full legal title unless the redemption price is paid, but the purchaser can not demand any performance from the mortgagor. Therefore he does not hold a "claim" and Section 1322(b)(5) is inapplicable.

Petitioners argue (Pet. p. 13) that the *Taddeo* Court would have held the power to cure continues to exist even after the foreclosure sale. However, on the same page, petitioners concede that, in New York, a debtor does not have the right to redeem after a foreclosure sale. Petitioners fail to explain what the *Taddeo* court would have based this power to cure on since the debtor in New York would not have any interest in the collateral after the sale.

It should also be noted that the reasoning in *Taddeo* is less than persuasive. In response to the argument that Section 1322(b)(2) prohibited any modification to the rights of a holder of a secured claim in the debtor's principal residence, the *Taddeo* court held that the prohibition against modifying the rights of creditors found in subsection (b)(2) was only intended to insure that a plan preserved the size and frequency of the installment payments as they were originally contracted. This unique definition of "modify" was rejected by the Ninth Circuit in *Seidel*, 752 F.2d 1382 (1985) at pages 1384-1386. The word "modify" should not have such a narrow definition in a bankruptcy context. It should have the same meaning in the Code as it does in every day common usage. The *Seidel* court adopted the "plain meaning" rule of statutory interpretation. See also *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 477 U.S. 102 at 108 (1980), *NLRB v. Amax Coal Co.*, 453 U.S. 322 at 329 (1981) and *Watt v. Alaska*, 451 U.S. 259 at 266 (1981). Presumably the *Seidel* court, if the issue had been before it, would have applied the same rule of statutory interpretation to the phrase "curing any default". Setting aside a foreclosure sale is no longer simply a matter of curing a default. It is a modification of the rights of the secured creditor and the purchaser at the foreclosure sale.

II. The plain meaning of Section 1322(b)(5) does not provide for setting aside a foreclosure sale and reinstating a mortgage loan upon its original terms.

This is a clear case of where the plain meaning of the statute should be given effect. Language used in a statute which has a settled and well known meaning sanctioned by judicial decision is presumed to be used in that sense by the legislative body. *Kepner v. U.S.*, 195 U.S. 100 at 124 (1904).

The specific language in Section 1322(b)(5) merely provides for curing a default and maintaining the regular installment payments while the plan is in effect. The basic assumption underlying Section 1322(b)(5) is that there is still a long term installment loan in existence under non-bankruptcy law. This section is completely silent as to what a Chapter 13 debtor may do when the collateral had already been sold, before the bankruptcy filing, at an auction sale to satisfy the debt. This congressional silence is presumptive evidence that Congress did not intend, let alone even contemplate, vesting the Bankruptcy Courts with the power to set aside a foreclosure sale which had occurred prior to the bankruptcy filing.

The cases which have found authority in Section 1322(b)(5) to set aside foreclosure sales have ignored the specific language of the statute and relied instead upon a vague notion of furthering the rehabilitation of the debtor, e.g. *In re Thompson*, 17 B.R. 748 (Bkrtcy. W.D. Mich. 1982) at page 752. They point out the Congressional intent, in general, was to make Chapter 13 proceedings more accessible to debtors under the Code than it was under the Act. At best, this ignores the balancing of competing interests that went into the legislative process. *Glenn* at pages 1433-34. At worst, this is legislation by judicial fiat.

The Circuit Court cases, *Taddeo*; *Glenn*; *In re Grubbs*, 730 F.2d 236 (5th Cir. 1984); and *In re Clark*, 738 F.2d

869 (7th Cir. 1984), have all examined the legislative history in detail and one fact has been conspicuous by its absence. Not one case has been able to find a single statement by anyone involved in the legislative process wherein the specific possibility of setting aside a mortgage foreclosure sale was even discussed. If that concept had even remotely entered the minds of those who were drafting the Code, there is no doubt that such a possibility would have generated hours of hearings and debates.

This statement can be made with assurance because the mere suggestion that the legal efficacy of a foreclosure sale could be cast into doubt by a subsequent bankruptcy filing would have sent seismic shock waves throughout the mortgage lending industry. Not only would it have affected how the loan originators underwrote their lending risks, but it would also have affected how mortgages were purchased and serviced in the secondary market. Today, after arguing this issue for several years, it has lost some of its novelty, but in 1978, when the Code was passed, the concept was unheard of. It could not have passed through both houses of Congress without provoking some comment from some quarter.

This argument is buttressed by three points. Congress had, in the past, passed a specific statute tolling the redemption period after a foreclosure sale by means of a bankruptcy filing. This is the 1935 amendment to the Frazier-Lemeke Farm Mortgage Act (August 28, 1935, Number 384, 49 Stat. 942) which was an "emergency measure" (see section 6 of the amendment) enacted in the midst of the Great Depression. Therefore, Congress clearly had historical precedent before it if Congress wanted to enact such a law. It is reasonable to assume that if Congress had clearly expressed its intent to toll the running of redemption periods in 1935, it could have just as clearly expressed that intent (if, in fact, such was its intent) in 1978. See *Johnson v. First National Bank of Montevideo*, 719 F.2d 270 (8th Cir. 1983) at page 276.

Secondly, there are two other sections in the Code where Congress specifically intended to give the trustee power to set aside conveyances or transfers which occurred prior to the bankruptcy filing. They are Section 547 (preferential transfers) and Section 548 (fraudulent conveyances). If Congress had intended to give the debtor power to set aside a foreclosure sale which occurred prior to the bankruptcy filing then it could have spelled out that power in the same manner as it did in these two sections. Since Congress did not do so, then it is reasonable to conclude that Congress did not intend to allow it.

Third, Congress did provide, where the foreclosure sale occurred prior to the bankruptcy filing, a specific mechanism to toll the redemption period and to allow the trustee to redeem the debtor's property if it had value in excess of the price brought at the foreclosure sale. In Section 108(b) of the Code, a trustee is guaranteed a minimum of 60 days in which to redeem the property. In effect, this is a specific statutory tolling of the redemption period so that the trustee has time to determine if there is any equity in the property and to explore ways to obtain credit to redeem from the purchaser at the foreclosure sale. Section 364 of the Code provides authority for the trustee to obtain credit from another lender. Bankruptcy Rule 6008 gives specific authority to the trustee to redeem property. The important point is that this was the mechanism which Congress put in place to deal with foreclosure sales occurring prior to the bankruptcy if there was excess value in the property.

III. It isn't the property itself that becomes part of the bankruptcy estate, but rather it is the debtor's interest in the property which becomes part of the estate and a Bankruptcy Court may not enlarge that interest.

Section 541 of the Code defines what comprises the bankruptcy estate. It provides that ". . . all legal or equitable interests of the debtor in property as of the commencement of the case . . ." become part of the estate.

The legislative history indicates that state law would determine the extent of the debtor's interest in the property, and that the trustee would take no greater rights in the property than were possessed by the debtor when he filed his petition. See House Report No. 95-595, 95th Cong., 1st Sess. 367-8 (1977); Senate Report No. 95-989, 95th Cong. 2nd Sess. 82-3 (1978), and *Johnson* (8th Cir.) at pages 273-4.

Bankruptcy Courts are not free to fashion substantive rights that the state itself does not provide, or ignore the rights and duties the state has established. The Bankruptcy Code provides no federal authority to create a uniform commercial law. A bankruptcy court may not enlarge the debtor's property rights beyond those created under state law. See *Butner v. United States*, 440 U.S. 48 at 55 (1979) and *Stellwagen v. Clum*, 245 U.S. 605 (1918).

The statutory right of redemption, not the real property itself, becomes part of the estate. *Collier on Bankruptcy*, 15th Ed; 4:541.07(3) and *Johnson* (8th Cir.) at 276.

Under Michigan law a debtor continues to hold legal title to the property but it is a defeasible title. It is not a fee simple absolute title. *Dunitz v. Woodford Apartments Co.*, 236 Mich. 45, 209 NW 809 (1926) pages 49-50. If the mortgagor fails to redeem within the period allowed by statute, his interest in the property is extinguished automatically. *Dunitz v. Braver*, 252 Mich. 114, 233 NW 347 (1930), *Detroit Fidelity & Surety Co. v. Donaldson*, 255 Mich. 129, 237 NW 380 (1931). The mortgagor must pay the full amount within the redemption period. *Heimerdinger v. Heimerdinger*, 299 Mich. 149, 299 NW 844 (1941). Equitable title is transferred to the purchaser upon a foreclosure sale and the right of redemption is not an interest in land, but a mere personal privilege given by statute to the mortgagor after the land

has been sold. *Gerasimos v. Continental Bank*, 237 Mich. 513, 212 N.W. 71 (1927). If a bankruptcy court may allow the debtor additional time to redeem the property then that is an impermissible expansion of the rights possessed by the debtor and a corresponding reduction of the rights possessed by the purchaser at a foreclosure sale.

Petitioners argue (Pet. p. 15) that the right to cure exists as long as a debtor continues to have an interest in the collateral at the time he files his petition. That should not be the test. The expression "cure a default" has been commonly understood to imply that there is still a loan in existence and that the collateral has not been sold to satisfy the obligation. The test should be whether the creditor has exercised the remedies available to him under state law and changed the nature of the obligation. To suggest that the statutory right to redeem (i.e. the right to repurchase the collateral at the price bid for it at the foreclosure sale) also gives the debtor the right to revive the debt obligation is to stretch the concept of "curing a default" beyond all reason.

The petitioners also invoke (Pet. pp. 15-16) the spectre of unequal treatment of borrowers from state to state. That is, in one state a borrower might be given more notice of an impending sale, or in another state he might be given more time to redeem the property after the sale. Therefore, the petitioners argue, the Bankruptcy Code will be applied in an unequal manner and there won't be a uniform bankruptcy law.

In response to this argument, the Bankruptcy Code does not spring into existence out of a void. There is no bankruptcy "common law" which defines property rights. Property rights are defined by state law. In effect, state law is the foundation and bankruptcy law is the structure resting on it. State law has, and always will, vary from state to state, but this is not a sufficient justification to dispense with this basic concept of the relationship be-

tween state law and bankruptcy law. To take the petitioners' argument to its logical conclusion, it would require a bankruptcy judge to scan the laws of each of the fifty states to find which one gives a borrower the most notice, the most time to redeem, the best terms for the sale, etc., and then incorporate the foreign law into the laws for the home state or use it to preempt any law of the home state which might be contrary to what he has selected as the most liberal for the debtor. If there is more than one issue involved, should the judge choose statutes from several different states and incorporate all of them into the laws of the home state? How does he determine which state law is the most beneficial to the debtor at any particular point in time? How are the attorneys to know which state law is applicable to their case? How can they advise their clients? If there is a conflict between various states, should the bankruptcy judge render an opinion on each state law and then choose the bits and pieces from each state he believes to be the most beneficial to the debtor? Clearly, it would be an impossible situation.

Petitioners cite *Kokkinis*, 22 B.R. 353 (Bkrtcy. M.D. Ill. 1982) as support for the argument that a debtor could accomplish the same thing under Section 1322(b)(3) or (b)(10). If a debtor could use either of those sections in place of Section 1322(b)(2) and (b)(5), then the latter sections would be rendered superfluous. See the discussion of Sections 362 and 108 below.

Petitioners argue that setting aside a foreclosure sale does not materially affect the rights of the mortgagee since the mortgagee will be restored to its original position. (Pet. pp. 13-14). The legislative history cited by petitioners relates to an issue found only in Chapter 11; i.e., whether a secured creditor's claim is impaired if a debtor is allowed to reinstate the original terms of an obligation after the secured creditor had declared it in default and accelerated the debt. "Materially affected" is

merely a test to determine whether a claim is "impaired" or not. "Impaired" is not a concept found in Chapter 13 and the whole discussion is irrelevant. Moreover, it is not just a question of whether the rights of the mortgagee will be materially affected. The rights of the purchaser at the foreclosure sale will, without question, be materially affected and he and the mortgagee are not always one and the same.

IV. Case law under the Act.

In evaluating case law under the Act, *Hallenbeck*, 323 F.2d 566 (4th Cir. 1963) was a leading decision. However it was a pre-foreclosure sale case. The only issue was whether a bankruptcy court could enjoin a creditor from commencing a foreclosure sale, despite the statutory limitations found in the Act. Section 1322(b)(5) of the Code is the statutory embodiment of *Hallenbeck*. See *United Companies Financial Corp. v. Brantley*, 6 B.R. 178 at 190 (Bkrtcy. N.D. Fla. 1980). The *Grosso Investments Inc.*, 457 F.2d 168 (9th Cir. 1972) opinion can only be explained as an aberration from the majority of the cases under the Act. See the cases collected in *Johnson* (8th Cir.) at page 277. It is the only circuit court decision under the Act which held that the Bankruptcy Court had the power to stay the running of the redemption period. The central deficiency of the *Grosso* opinion lies in its view of the relationship between state law and bankruptcy law. In short, the court was not overly concerned with what interests in property the debtor possessed under state law. See page 172. The Court determined that the debtor still possessed "legal title" to the property after the sale and that determination settled the issue for the Court without further inquiry into the nature and extent of the "legal title". For example, the so-called "legal title" after a foreclosure sale in Michigan is a defeasible title upon the expiration of the statutory redemption period, *Supra*. It appears that the *Grosso* court starts with the proposition that the bankruptcy

laws exist for the sole benefit of the debtors and as long as state laws support a conclusion beneficial to the debtor, they may be relied upon; however, to the extent that they do not square with that proposition, then they are preempted by the federal bankruptcy laws, or simply ignored. This selective use of state law renders the *Grosso* decision questionable as precedent. The *Freed*, 534 F.2d 1235 (6th Cir. 1976) and *Chatman*, 527 F.2d 691 (6th Cir. 1975) opinions are both *Hallenbeck* types cases.

V. The relationship between Section 362 and Section 108.

Section 362 does not operate to toll the running of the redemption period. The *Bevan*, 13 B.R. 989 (E.D. Mich. 1981) and *Johnson*, 8 B.R. 371 (Bkrtcy. D. Minn. 1981) decisions were published almost simultaneously. The overwhelming majority of the cases have chosen to follow the analysis made by *Bevan* as to the relationship between Section 362 and Section 108. See *Johnson* (8th Cir.) at 275-8. *Bevan* held that the specific section of a statute controls the general section. *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204 at 208 (1932); *Kepner v. U.S.*, 195 U.S. 100 at 125 (1904). A statute should be interpreted so as not to render one part inoperative. *Colautti v. Franklin*, 439 U.S. 379 at 392 (1979); *Reiter v. Sonotone Corp.*, 442 U.S. 528 at 538-9 (1955); *Market Co. v. Hoffman*, 101 U.S. 112 at 115-6 (1879).

The analysis (Pet. p. 28) made in *H & W Enterprises, Inc.*, 19 B.R. 582 (Bankrtcy. N.D. Iowa 1982) is wrong because it ignores the legislative history. The phrase, "including any suspension of such period occurring on or after the commencement of the case" refers to any non-bankruptcy law that tolls the running of applicable time limits. Section 108(c) contains the same phrase. The legislative comments to subsection (c) of Section 108 make it clear that the drafters were referring to any non-bankruptcy law, such as the Internal Revenue Code which provides that the statute of limitations on collec-

tion of non-dischargeable tax liability will resume running six months after the expiration of the Bankruptcy Court's control over the debtor's assets. In short, a creditor gets the benefit of any suspension of the statute of limitations provided by non-bankruptcy law and is guaranteed a minimum of thirty days after the expiration of the stay to pursue his remedies. See 124 Cong. Rec. H 11, 109 (Sept. 28, 1978); S 17426 (Oct. 6, 1978). Conversely, the trustee, under Section 108(b), gets the benefit of any suspension of a time limitation granted by non-bankruptcy law; but is guaranteed a minimum of sixty days from the date of the petition to decide what he is going to do with the assets of the estate.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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